IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES BARNES,

Defendant.

Case No. 91-CR-50-C
and
Case No. 96-CV-198-C

ORDER

Before the Court is the motion of defendant James Barnes to vacate, set aside or correct the sentence imposed on him on December 13, 1991, filed pursuant to 28 U.S.C. § 2255. Barnes was tried before a jury and convicted of conspiracy to manufacture, possess, and distribute methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a), 846. Following sentencing Barnes perfected a direct appeal challenging his conviction and sentence. The case was affirmed by the Tenth Circuit on February 16, 1993. See, United States vs. James Barnes, 986 F.2d 1430 (10th Cir. 1993)(unpublished). Barnes filed on July 19, 1993, a previous motion under § 2255, which was denied by the Court on December 16, 1993. The denial of Barnes' first § 2255 was affirmed by the Tenth Circuit on December 9, 1994. See, United States v. James Barnes, 43 F.3d 1484 (10th Cir.1994) (unpublished).

In his recent § 2255 motion to modify or set aside sentence, Barnes asserts four grounds for relief:

(1) Barnes' conviction of drug conspiracy and the prior administrative forfeiture of his property involved in the drug conspiracy allegedly violates the Double Jeopardy Clause of the Fifth Amendment.

(2) Government's failure to satisfy its burden of providing reliable and accurate sentencing information concerning the type of methamphetamine involved in the drug conspiracy allegedly increased his sentence.

(3) Ineffective assistance of counsel, by his attorney's alleged failure to object to the Court's application of the offense level for D-methamphetamine rather than L-methamphetamine.

(4) Newly discovered evidence which allegedly undermines the reliability of testimony regarding the drug quantities attributed to Barnes in the conspiracy.

The Court has reviewed the record in the case, and the exhibits in support of Barnes' motion and finds that the sentence imposed is proper and that defendant's grounds for modification or vacation of said sentence are without merit.

Barnes' argument that the Double Jeopardy Clause prohibits the government from punishing a defendant for a criminal offense and forfeiting his property for that same offense in a separate civil proceeding, has been settled by the recent decision of United States v. Ursery, 116 S.Ct. 2135 (1996). In Ursery the Court held that in rem civil forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause, thereby reversing the line of cases cited by the defendant in support of his Double Jeopardy claim.

As a secondary issue under his challenge to the forfeiture proceeding, Barnes contends that he was denied due process of law by the government forfeiting his property without providing him notice of the administrative proceeding. In this regard, the Tenth Circuit has held that in civil forfeiture actions, due process requires that the government send notice by mail or other means as certain to ensure actual notice. See, United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1316 (10th Cir.1994). Due process does not require, however, that the interested party actually receive notice. So long as the government acted reasonably in selecting means likely to inform the persons

affected, then it has discharged its burden. Id. Whether the government used means reasonably calculated to provide actual notice is a question of fact.

In response to Barnes' claim, the government offers the affidavit of William Snider, Forfeiture Counsel in Washington D.C. for the Drug Enforcement Administration. Mr. Snider advises that seizure of the $2,070 in U.S. currency from Barnes' home occurred on February 1, 1990, more than a year prior to Barnes' criminal prosecution for drug trafficking. On February 23, 1990, written notice of the seizure was sent by certified mail, return receipt requested, to Barnes at his residence in Tulsa. Government attached as exhibits copies of these documents. Government sent the notice of seizure to the same residence in which the $2,070 had been seized twenty-two days earlier. This address is the same address provided by Barnes to the Court in his criminal case more than one year later.

Government's exhibits indicate that delivery of the certified documents was attempted on two occasions, and the document was returned "unclaimed." At the time that the notice was sent to Barnes' residence, he was still residing at his residence. Barnes was not in federal custody nor was he being prosecuted for any federal offense at the time of delivery of the certified documents.

Government also published notice for three consecutive weeks in USA Today of the administrative forfeiture proceedings against the $2,070. USA Today is in general circulation in the Tulsa area. No claims to the property were received by the DEA and the Declaration of Forfeiture was entered on April 20, 1990.

The Court finds under the facts of this case, that government acted reasonably in selecting a means which was likely to inform Barnes that the currency previously seized from his residence was subject to forfeiture. The exhibits tendered by the government clearly indicate that government sent

the appropriate notice with the required information to Barnes' last known residential address. The fact that the documents were returned "unclaimed" is no indication that government acted unreasonably. Barnes was aware of the search and seizure of the currency, and he was aware that he was being investigated for narcotics trafficking. Government subsequently published notice of its intent to forfeit the currency and no notice of dispute was received. Barnes' due process challenge to the sufficiency of notice employed by the government under these circumstances is clearly without merit.

Barnes' second and third grounds for relief are related. In these claims Barnes contends that the government and his attorney both failed to carry out certain alleged responsibilities which may have resulted in a lesser sentence. Barnes contends that his counsel failed to require the Government to prove that the methamphetamine involved in the conspiracy was D-methamphetamine and not L-methamphetamine. In essence, Barnes' contends that this Court erroneously calculated his sentence under the Sentencing Guidelines based on D-methamphetamine, which produced a higher base offense level and thus a longer sentence than if the sentence had been calculated under L-methamphetamine.

The term "methamphetamine" is often used generically in indictments, plea bargains and in evidence at trial because the type of methamphetamine involved in the conspiracy will not affect the issue of guilt or innocence of the offense of drug trafficking. At trial government need only establish the involvement of methamphetamine, not the type of methamphetamine. The distinction in types of methamphetamine would only come into play, if at all, at the time of sentencing.

Although the government generally bears the burden at sentencing to prove by a preponderance of the evidence the type of methamphetamine involved in a drug offense, the government should only be required to shoulder this burden if the defendant challenges the type of

methamphetamine at trial or at the sentencing hearing. See, United States v. Acklen, 47 F.3d 739, 742 n.4 (5th Cir.1995). Because D-methamphetamine is the commonly understood type of methamphetamine used in wide-scale narcotic conspiracies, as is the case in this instance, there is no indication that government must prove D-methamphetamine was actually involved until the evidence or the defense raises the possibility that L-methamphetamine was involved.

In his § 2255 motion, Barnes tenders no evidence to the Court that L-methamphetamine was involved in the conspiracy. Rather, Barnes would have the Court proceed on the assumption that the narcotic involved in the offense was L-methamphetamine unless government established otherwise.

The evidence at trial supports the Court's use of D-methamphetamine in its sentencing calculation. The trial evidence established that this was a wide-scale narcotic conspiracy, involving multiple coconspirators, and a successful distribution of large quantities of methamphetamine. No evidence was presented during the trial or during the sentencing hearing that more than one type of methamphetamine was involved. No objection was ever made throughout the trial concerning the type of methamphetamine involved in the conspiracy. No objection was raised by the defendant about the type of methamphetamine used in the presentence report, although the presentence report clearly calculated Barnes' base offense level by using D-methamphetamine. At the sentencing hearing the Court specifically inquired of Barnes whether the presentence report was accurate and correct and Barnes, personally, indicated in the affirmative. The evidence revealed that Barnes' principal role in the conspiracy was that of an experienced distributor of illegally manufactured methamphetamine. Barnes, having acquired expertise from his drug trafficking experiences, was in the best position to object at the sentencing hearing if the drug he was distributing was not properly classified in his

presentence report. Since Barnes has offered no evidence to indicate that L-methamphetamine was involved in the conspiracy, the Court finds no merit in Barnes' belated assumptions.

Additionally, Barnes is procedurally barred from raising an objection to the use of D-methamphetamine in calculating his sentence. Section 2255 is not available to test the legality of matters which should have been raised on direct appeal, unless a defendant can show cause excusing his procedural default, actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed. United States v. Cook, 997 F.2d 1312 (10th Cir.1993). In this regard, Barnes asserts his claim of ineffective assistance of counsel. An ineffective assistance claim has two components. "First [claimant] must show that counsel's performance was deficient." United States v. Owens, 882 F.2d 1493, 1501 (10th Cir.1989). The proper standard for attorney performances is that of reasonably effective assistance. The judicial scrutiny of counsel's performance must be highly deferential and the Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Owens, 882 F.2d at 1501. The claimant must also show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the result being challenged. Strickland v. Washington, 466 U.S. 668, 686 (1984).

First, Barnes has not established the requirement of "unreasonable conduct" in his sentencing counsel's failure to require government to prove that D-methamphetamine was involved in the conspiracy. There was no mention in the trial evidence of the manufacturing of a lesser potent methamphetamine than the commonly distributed D-methamphetamine. No party, or witness in the case, even mentioned L-methamphetamine. No drugs were confiscated by government and thus the

drugs involved were not available for laboratory analysis at the time of trial or sentencing. The government, the defense, and the Court all reasonably concluded from the evidence presented (including the materials and equipment used to manufacture the methamphetamine, the distribution scheme and the extent of the clandestine activities) that the classification of the methamphetamine as "D-" was reasonable in calculating Barnes' base offense level. Thus, the Court finds that counsel's performance, under the evidence of this case, was reasonable under professional standards.

Second, Barnes has not establish a "reasonable probability" that the result of his sentencing would have been different had counsel required the government to prove the type of methamphetamine involved in the conspiracy. Barnes has submitted no evidence which would establish doubt that anything other than D-methamphetamine was involved in this conspiracy. Additionally, Barnes was sentenced to a term of imprisonment of 130 months. Barnes was subject under 21 U.S.C. § 641(b)(1)(A)(viii) to a minimum mandatory sentence of ten years imprisonment since his conviction involved methamphetamine or any of its salts or isomers. Since D- and L-methamphetamine are isomers, Barnes' sentence was within the proper Guideline range.

Finally, there is no substance to Barnes' claim of newly discovered evidence. Barnes' contends that the information relied upon by the Court in determining the amount of narcotics attributable to him in the conspiracy came from an unreliable source. In support of his claim, Barnes offers a transcript of a change of plea proceeding in a subsequent indictment involving Johnny Glover, who was a co-defendant in this case. In this case, Johnny Glover was charged with being the leader and organizer of the conspiracy involved herein. Subsequent to testifying on behalf of the government in this trial, in exchange for a lesser sentence Glover furnished an affidavit which indicated that certain portions of his trial testimony were false. In the subsequent proceeding, Glover plead guilty to a

perjury charge of providing inconsistent statements under oath. Barnes' claim of newly discovered evidence arose out of these inconsistent statements. However, Glover's affidavit limited his retractions to testimony regarding only his two brothers and was unrelated to his testimony involving Barnes. At no time has Glover indicated that he testified falsely about Barnes role in the conspiracy or Barnes' culpability. Moreover, in the subsequent change of plea hearing, Glover refused to admit which one of the two inconsistent statements was false. Thus, although Glover's credibility as a witness is subject to attack, such a situation does not rise to the level of "newly discovered evidence." There was sufficient independent evidence at trial to establish that Barnes' principal role in the conspiracy was that of a distributor of a substantial sum of narcotics.

Accordingly, the Court finds no merit in Barnes' second motion for reduction, modification or vacation of the sentence imposed on December 13, 1991 and denies the same.

IT IS SO ORDERED this 9th day of October, 1996.

H. DALE COOK
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA THOMAS, surviving widow of Harold Thomas, deceased,

Plaintiff,

v.

MARS B. GONZAGA, M.D.,

Defendant.

Case No. 95-C-1046-K

JUDGMENT

This action came on for trial to a jury on September 23, 1996, the Honorable Terry C. Kern, District Judge, presiding. The jury returned a verdict on September 27, 1996 finding the Defendant, Mars B. Gonzaga, M.D., liable for the wrongful death of Harold Thomas, and awarded $81,000 in damages. In addition to finding the Defendant liable, the jury also found that the deceased, Harold Thomas, was 50% contributorily negligent for his own death.

Judgment is therefore ORDERED in favor of Plaintiff and against Defendant on all claims, with the damages awarded hereby reduced by the percentage of contributory negligence of the deceased, Harold Thomas.

IT IS THEREFORE ORDERED that the Plaintiff recover from the Defendant the sum of $40,500, with post-judgment interest thereon at the rate of 5.90 percent as provided by law.

ORDERED THIS 8 DAY OF OCTOBER, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. THE HEIRS, PERSONAL REPRESENTATIVES, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF GERALDINE WISHART, DECEASED; DAVID WISHART; PHIL C. WISHART; VICTORIA WISHART; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	Civil Case No. 95-CV 938E

FILED
OCT 9 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
OCT 10 1996
DATE

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

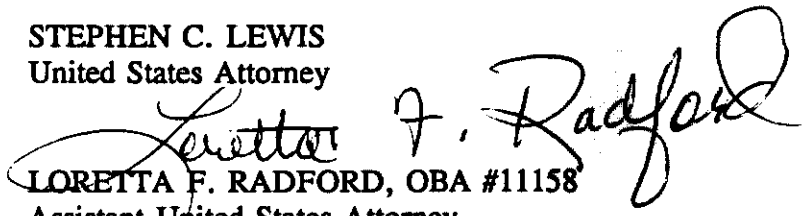
Dated this 8th day of October, 1996.

UNITED STATES DISTRICT JUDGE

(14)

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE H. PALMER,

Plaintiff,

vs.

WASHINGTON NATIONAL INSURANCE COMPANY, an Illinois corporation,

Defendant.

No. 96-C-880-C

ORDER

Currently before the Court is the Notice of Removal filed by defendant, Washington National Insurance Co. ("Washington"), on September 25, 1996. On September 4, 1996, plaintiff, Eddie Palmer, filed his Petition against Washington in the District Court of Tulsa County, alleging breach of insurance contract. No motions are currently pending in the present case.

Defendant removed the present case pursuant to 28 U.S.C. § 1446, and defendant bases jurisdiction on diversity of citizenship, pursuant to 28 U.S.C. § 1332. In order to invoke diversity jurisdiction, Washington must demonstrate, inter alia, that the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs. 28 U.S.C. § 1332(a). The Court concludes that defendant has failed to meet the requisite showing of the amount in controversy, and the present case must therefore be remanded to state court.

The Court notes that plaintiff has not filed a motion seeking remand. However, "if the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter." Laughlin v. K-Mart Corp., 50 F.3d 871, 873 (10th Cir.1995), cert. denied, 116 S.Ct. 174 (1995). "'[T]he rule . . . is inflexible and without exception, which requires [a] court, of its

own motion, to deny its jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record.'" Id. (quoting, Ins. Corp. v. Compagnie des Bauxites, 456 U.S. 694, 702 (1982)). "The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. . . . The burden is on the party requesting removal to set forth, in the notice of removal itself, the 'underlying facts supporting [the] assertion that the amount in controversy exceeds $50,000.' Moreover, there is a presumption against removal jurisdiction." Laughlin, 50 F.3d at 873.

The Court finds that Palmer's Petition does not state with any degree of certainty the amount in controversy. The Petition merely seeks damages occasioned by Washington's alleged breach, and the Petition further seeks punitive damages in excess of $10,000. Thus, the Petition is not dispositive with respect to the amount in controversy. Moreover, Washington's notice of removal does not provide the Court with any underlying facts which support Washington's assertion that the amount in controversy exceeds $50,000. The notice of removal merely contains a conclusory statement that defendant believes that the actual amount in controversy exceeds $50,000 because plaintiff claims to be entitled to unspecified actual damages and punitive damages in excess of $10,000. Clearly, such a bald assertion by Washington fails to establish Washington's burden of proof with respect to the jurisdictional issue. Since neither the allegations in the Petition nor in the Notice of Removal establish the requisite jurisdictional amount, the Court concludes that the present case must be and hereby is remanded to the state court in which it was originally filed.

IT IS SO ORDERED this 9th day of October, 1996.

H. Dale Cook
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ERNEST A. BEDFORD,

Plaintiff,

vs.

No. 96-C-716-C

THE WINDSOR GROUP, formerly doing business as American Deposit Insurance Corporation, and STATE BANK & TRUST, N.A., a national banking association,

Defendants,

STATE BANK & TRUST, N.A.,

Third Party Plaintiff,

vs.

BENNIE HARRISON,

Third Party Defendant.

ORDER

Currently pending before the Court is the motion filed by third party defendant, Bennie Harrison, and plaintiff, Ernest Bedford, in opposition to removal by defendant and third party plaintiff, State Bank & Trust ("State Bank").

On August 7, 1996, State Bank filed its notice of removal of the present action from the District Court of Tulsa County to this Court, pursuant to 28 U.S.C. § 1446. The original complaint in this case was filed by plaintiff on February 13, 1995. State Bank currently bases its removal on the grounds that on July 12, 1996, it received a counterclaim of third party defendant, Harrison, in which Harrison asserts claims against State Bank and their counsel, Conner & Winters, for violation of the

Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, as well as for intentional infliction of emotional distress. Hence, State Bank alleges that this Court now has jurisdiction of this matter pursuant to 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331, and of all other claims and counterclaims under the doctrine of pendent jurisdiction.

On September 6, 1996, Harrison and Bedford filed a motion in opposition to removal of this case from the District Court of Tulsa County. In support of their motion, petitioners allege that the "counterclaim" which State Bank relies upon for removal was, in actuality, merely a "request" made July 8, 1996, to file such a counterclaim. Thus, since no counterclaim was actually filed, no party has properly raised a federal question in the present case.

State Bank, in its response to petitioners' motion for remand, concedes that Bedford merely sent a copy of his "proposed" federal claim to State Bank. However, State Bank argues that the time to remove a case does not depend on a filed pleading stating a federal claim, but runs from the date upon which the party effecting removal first becomes aware that the case may be removable. State Bank cites 28 U.S.C. § 1446(b), which provides, in part, that if "the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." State Bank contends that by sending a copy of his proposed federal claim to State Bank, Bedford caused State Bank to receive a copy of a paper from which it may be ascertained that the case is removable.

The Court notes that neither party cited case authority for their respective positions regarding the present motion. However, the Court finds that a mere proposal to file a counterclaim which allegedly raises a federal question is insufficient to establish the existence of grounds for the removal

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION,[1/]

Plaintiff,

v.

JOSEPH A. FRATES; THORN HUFFMAN; JOHN E. DEAS; DAVID L. FIST; C. MICHAEL BARKLEY and ROBERT WESTFIELD,

Defendants.

No. 93-C-123-H

REPORT AND RECOMMENDATION

The following motions have been referred to the undersigned Magistrate Judge for report and recommendation: (1) "Defendant Barkley's Opening Motion to Dismiss for Failure to State A Claim"[2/], (2) "Defendant Robert Westfield's Motion for Summary Judgment"[3/], and (3) "Motion for Summary Judgment of Defendant David L. Fist."[4/] These motions will be referred to as the Barkley-Westfield-Fist motions. A reference to Defendants herein will be a reference to Messrs. Barkley, Westfield and Fist, unless otherwise indicated.

[1/] Pursuant to the Resolution Trust Corporation Completion Act, 12 U.S.C. § 1441a(m)(1) and (2), the Resolution Trust Corporation ("RTC") ceased to exist after December 31, 1995. As of January 1, 1996, all assets and liabilities of the RTC were transferred to the Federal Deposit Insurance Corporation ("FDIC") as manager of the FSLIC Resolution Fund. See 12 U.S.C. § 1821a(a)(1). Therefore, pursuant to Fed. R. Civ. P. 17, 21 and 25(c), the FDIC is substituted for the RTC as the Plaintiff in this action. Any reference to the FDIC shall be treated as a reference to the RTC for the time period when the RTC was in existence.

[2/] The docket number of this motion is 88 and the docket numbers of the parties' briefs are 89, 92, 97, 142, 148 and 196. In a previous Order, the Court converted Mr. Barkley's motion to dismiss into a motion for summary judgment. See Doc. No. 191.

[3/] The docket number of this motion is 93 and the docket numbers of the parties' briefs are 94, 99, 103, 142, 146, 194, 196 and 197. In a previous Order, the Court made it clear that Mr. Westfield's motion would be treated as a motion for summary judgment. See Doc. No. 191.

[4/] The docket number of this motion is 169 and the docket numbers of the parties' briefs are 177, 196 and 204.

In the Barkley-Westfield-Fist motions, Defendants assert the following: (1) Defendants entered into agreements with the RTC to toll the statute of limitation applicable to this case; (2) the RTC breached these tolling agreements by suing Defendants 3½ months too early; and (3) due to the RTC's breach, Defendants are free to assert the statute of limitations as a complete defense to Plaintiff's claims.

Having reviewed the parties' submissions and having heard oral argument on June 10, 1996, the undersigned Magistrate Judge hereby offers the following Report and recommends that the Barkley-Westfield-Fist motions be **DENIED**. The undersigned finds that there are genuine issues of material fact which preclude the entry of summary judgment.

I. Factual/Legal Background

Defendants were officers and/or directors of State Federal Savings and Loan Association ("State Federal"), a federally chartered depository institution. The Director of the Office of Thrift Supervision ("OTS") declared State Federal insolvent and appointed the RTC as State Federal's receiver on February 16, 1990 to liquidate State Federal's assets. One such asset to be liquidated by the RTC was any claim State Federal might have had against its officers and/or directors. This lawsuit is an attempt by the RTC to liquidate that asset. The FDIC has since been substituted for the RTC. See n.1, *supra*.

The statute of limitations analysis under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") is two-tiered. To determine if a claim against an officer or director of a financial institution is time barred, the first step is to look at the date the RTC was appointed receiver and ascertain as of that moment whether the claims pled by the RTC are barred by the most analogous state statute of limitations. If the RTC's claims are barred by state law on the date the RTC is appointed receiver, the claims cannot be revived and they are time barred forever. If, however, the RTC's claims were timely under state law on the date of receivership, you move to step two to determine if the claims are time barred by FIRREA's statute of limitations. See FDIC v. Regier Carr & Monroe, 996 F.2d 222, 225-26 (10th Cir. 1993); FDIC v. Farris, 738 F. Supp. 444 (W.D. Okla. 1989) (outlining the two-step process described above).

Defendants are not arguing that step one of the above analysis is not satisfied. That is, Defendants are not arguing that Oklahoma's statute of limitations had run before the RTC was appointed receiver. The focus of the Barkley-Westfield-Fist motions is at step two.

For claims sounding in tort, FIRREA allows the RTC to file suit within three years from the date of receivership or within the time remaining under the applicable

state statute of limitations, whichever is longer. See 12 U.S.C. § 1821(d)(14)(A)(ii)(I). For claims sounding in contract, FIRREA allows the RTC to file suit within six years from the date of receivership or within the time remaining under the applicable state statute of limitations, whichever is longer. See 12 U.S.C. §1821(d)(14)(A)(i)(I). The applicable state statute of limitations (i.e., 12 O.S. § 95) provides a limitation of two years for tort and five years for contract. The balance left on these Oklahoma limitation periods would not, therefore, extend beyond the limitation periods provided by FIRREA. In this case FIRREA's provisions provide the longest limitations period. The RTC was appointed as State Federal's receiver on February 16, 1990. Thus, under FIRREA's statute of limitations, the RTC's tort claims would be barred as of February 16, 1993, and the RTC's contract claims would be barred as of February 16, 1996. See 12 U.S.C. § 1821(d)(14)(A) & (B).

This action was filed on February 12, 1993, four days prior to expiration of FIRREA's tort statute of limitations. The original Complaint named Joseph A. Frates, Thorn Huffman, Alfred A. Phillips and Morgan Allen Greenwood's estate. Defendants Barkley, Westfield and Fist were not named. This is because on February 9, 1993 (i.e., one week before FIRREA's tort statute of limitations ran) these Defendants and the RTC entered into three separate agreements all titled "Agreement to Waive Statute of Limitations in Consideration of Forbearance from Suit" (hereinafter referred to as the tolling agreements) (Exhibit "B" to Mr. Barkley's motion). The terms of these three tolling agreements were identical.

Pursuant to the terms of the tolling agreements, the RTC agreed not to sue Defendants from February 8, 1993 to June 8, 1993 (i.e., the "period of forbearance"). In exchange for the RTC's forbearance, Defendants agreed to waive their statute of limitations defenses for the period of forbearance plus 30 days. Pursuant to these provisions, the RTC had a 30-day window, commencing on the date the period of forbearance expired, within which to sue Defendants. The end of the period of forbearance (i.e., the June 8, 1993 deadline) was extended several times by agreement of the parties. The last agreement extended the end of the period of forbearance to April 1, 1994. The RTC filed its Second Amended Complaint on December 15, 1993. [Doc. No. 70]. The Second Amended Complaint added defendants Barkley, Westfield and Fist. Thus, the RTC sued Defendants 3½ months before the end of the forbearance period specified in the parties' last extension agreement. Defendants argue that this was a breach of the tolling agreements.

II. Which Claims Are Affected by the Tolling Agreements?

In its Third Amended Complaint, Plaintiff asserts two sets of claims. The first set of claims relates to Mr. Frates' alleged failure to contribute to State Federal $27.4 million in capital he was contractually obligated to contribute when he purchased State Federal.[5/] Plaintiff alleges that the capital contributed by Mr. Frates fell short of the required $27.4 million by more than $10 million. These claims will be referred to as the capital contribution claims. The second set of claims relates to four non-performing loans made by State Federal. Plaintiff alleges that all Defendants acted unreasonably in permitting State Federal to make these loans.[6/] These claims will be referred to as the loan claims.

With regard to the capital contribution claims, Plaintiff alleges that Defendants should have either caused State Federal to sue Mr. Frates to obtain the additional capital he owed, or they should have further investigated Mr. Frates' capital contributions. Based on Defendants' alleged failure to do either, Plaintiff argues that Defendants are liable, and Plaintiff asserts three theories of liability -- negligence, breach of fiduciary duty, and breach of contract. See Counts III, IV & V of the Third Amended Complaint, doc. no. 170. The contract claim appears to be based on Defendants' employment contracts with State Federal to act as prudent officers and/or directors. Plaintiff has also asserted these three theories of liability in connection with the loan claims. Plaintiff argues that allowing the loans to be made was either negligent, a breach of Defendants' fiduciary duty to State Federal, or a breach of Defendants' contracts with State Federal to act as prudent officers and/or directors. See Counts VI, VII & VIII of the Third Amended Complaint.

5/ Plaintiff alleges that in 1986 Defendant, Joseph Frates, entered into an agreement to purchase State Federal. Such an agreement requires approval by the Federal Home Loan Bank Board ("FHLBB"). The FHLBB approved the agreement with certain conditions related to the amount of capital Mr. Frates would be required to contribute to State Federal. Plaintiff alleges that the FHLBB and Mr. Frates agreed that Mr. Frates would contribute real property with a minimum net equity of $27.4 million. Mr. Frates did transfer some real property to State Federal. However, the FHLBB disputed the accuracy of Mr. Frates' appraisal of the property he contributed.

6/ In particular, Plaintiff alleges that State Federal's Board of Directors, of which the Defendants were members, (1) approved or ratified the loans without sufficient information or investigation; (2) failed to establish adequate policies to ensure that unreasonably risky loans were not made; (3) failed to monitor and supervise the loan staff; and (4) failed to hire, train, or monitor the training of competent loan staff.

1. Tort Claims

FIRREA's limitations period for tort claims expired in this case on February 16, 1993. 12 U.S.C. § 1821(d)(14)(A)(ii)(I) & (B)(i). Defendants were first joined in this action on December 15, 1993, almost 10 months after the tort statute of limitations had expired. In order for the tort claims in the Second Amended Complaint to have been timely as to Defendants, the tolling agreements must have tolled the statute of limitations through December 15, 1993. If the tort claims in the Second Amended Complaint were timely, then the tort claims in the Third Amended Complaint are also timely under Fed. R. Civ. P. 15(c). Thus, the tolling agreements affect the tort claims in Plaintiff's Third Amended Complaint.

2. Contract Claims

At the time Plaintiff filed its Third Amended Complaint, all of Plaintiff's contract claims were timely. The contract claims in this case did not expire under FIRREA's statute of limitations until February 16, 1996. 12 U.S.C. § 1821(d)(14)(A)(i)(I) & (B)(i). Plaintiff filed its Third Amended Complaint on January 5, 1996, more than one month prior to the expiration of FIRREA's contract statute of limitations. The tolling agreements do not impact the timeliness of Plaintiff's contract claims. Defendants' motions for summary judgment are, therefore, denied as to Plaintiff's contract claims.

3. Breach of Fiduciary Duty Claims

To determine whether the tolling agreements affect Plaintiff's breach of fiduciary duty claims, the undersigned must determine whether these claims sound in contract or sound in tort. FIRREA provides only two general statutes of limitations -- one for torts and one for contracts. 12 U.S.C. § 1821(d)(14)(A). Claims for breach of fiduciary duty do not fall neatly into either of these categories. If the breach of fiduciary duty claims sound in tort, they are time barred by FIRREA's tort statute of limitation, unless extended by the parties' tolling agreement. If the breach of fiduciary duty claims sound in contract, they are not time barred for the reasons discussed in section II(B)(2), *supra*.

There is strong authority that claims based on a breach of fiduciary duty by an officer or director of a financial institution sound in contract. See Hughes v. Reed, 46 F.2d 435, 440-41 (10th Cir. 1931); FDIC v. Former Officers and Directors of Metropolitan Bank, 884 F.2d 1304, 1306-07 (9th Cir.1989), cert. denied 496 U.S. 936 (1990); U.S. Small Bus. Admin. v. Wasson, 865 F. Supp. 753, 754 (W.D. Okla. 1994); Bibo v. Jeffrey's Restaurant, 770 P.2d 290, 295-96 (Alaska 1989); RTC v. Gladstone, 895 F. Supp. 356, 374 (D. Mass. 1995); In re Argo Communications Corp v. Centel Corp., 134 B.R. 776, 788 (Bankr. S.D.N.Y. 1991) (all holding that breach of fiduciary duty claims sound in contract.). There is, however, some authority that

a breach of fiduciary duty claim sounds in tort. See Quinlan v. Koch Oil Co., 25 F.3d 936, 943 (10th Cir. 1994); RTC v. Bonner, 848 F. Supp. 96, 98 (S.D. Tex. 1994); FDIC v. Greenwood, 739 F. Supp. 450, 451-53 (C.D. Ill. 1989); Stewart Coach Indus. v. Moore, 512 F. Supp. 879 (S.D. Ohio 1981); Restatement (Second) of Torts, § 874, comment B (1979) (suggesting that breach of fiduciary claims may sound in tort). The parties have not addressed this issue in their briefs. Given the fact that the undersigned is recommending that Defendants' motions for summary judgment be denied, the undersigned declines to make a recommendation regarding whether a breach fiduciary duty claim sounds in tort or contract. The undersigned believes it better to resolve this issue at another time, once the parties have had an opportunity to properly brief the issue.

III. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE RTC BREACHED THE TOLLING AGREEMENTS.

A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Therefore, in order to obtain summary judgment on an issue of contract interpretation, the moving party must show that the contract is so clear that it can be read only one way (i.e., that it is not ambiguous). Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3rd Cir. 1987). If the non-moving party is able to present a reasonable interpretation that differs from the moving party's and if the non-moving party's interpretation is supported by adequate evidence, a question of fact as to the meaning of the contract exists. Id. To determine whether the non-moving party has presented such an interpretation, the court must examine the factual record and all reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party. Thomas v. IBM, 48 F.3d 478, 484 (10th Cir. 1995); Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A. Interpretation of the Tolling/Extension Agreements

On November 8, 1993, the parties extended the period of forbearance to April 1, 1994. This was the third such extension and it was accomplished through a letter agreement, which states as follows:

> This Letter Agreement hereby amends the Tolling Agreement ("Agreement") executed between the parties and dated February 8, 1993, as amended on June 4, 1993

and September 2, 1993, to extend for an additional period until April 1, 1994, the tolling of the statute of limitations.

(Exhibit "E" to Mr. Barkley's motion). Plaintiff argues that in light of the circumstances surrounding the execution of this and other extension agreements, this last extension agreement must be interpreted to allow Plaintiff to sue Defendants, under certain circumstances, prior to April 2, 1994. According to Plaintiff those circumstances are (a) a failure to reach settlement after a settlement conference, and (b) Court ordered joinder of additional parties prior to April 2, 1994. Defendants argue that the plain language of the parties' tolling agreement and the plain language of this last extension agreement prohibited the RTC from suing Defendants at any time prior to April 2, 1994. The Court is, therefore, faced with an issue of contract interpretation as to the meaning and purpose of the parties' last extension agreement.

Under Oklahoma law,[7/] a court's primary objective when interpreting a contract is to determine the true intent or object and purpose of the parties. McDowell v. Droz, 64 P.2d 1210 (Okla. 1937); Amoco Production Co. v. Lindley, 609 P.2d 744, 741 (Okla. 1980); Kelso v. Kelso, 225 F.2d 918 (10th Cir. 1955). All of the rules of contract construction are merely aids to the court in reaching this primary objective. A court will not apply the rules of construction in such a way as to defeat the parties' ascertainable intent. Universal Underwrites Ins. v. Bush, 272 F.2d 675, 678 (10th Cir. 1960).

Under Oklahoma law, it is well settled that when a contract's terms are not ambiguous the interpretation of those terms is an issue strictly for the court. Rider v. Morgan, 119 P. 958, 960 (Okla. 1910); Mitchell v. Vogele, 256 P. 906, 907 (Okla. 1927); Department of Highways v. Martin, 572 P.2d 611, 613 (Okla. App. 1977). It is also well settled that the initial determination of ambiguity is to be made by the Court. Dodson v. St. Paul Ins., 812 P.2d 372, 376-77 (Okla. 1991). When a contract's terms are found to be ambiguous, certain issues may be submitted to the jury.

What is not well settled, however, is how a court is to determine whether, as an initial matter, the terms of a contract are or are not ambiguous. As a general rule, a contract is ambiguous when its terms are reasonably susceptible to more than one meaning. International Environmental Corp. v. IT&T, 397 F. Supp. 253, 255 (W.D. Okla. 1975); Cinocca v. Baxter Laboratories, 400 F. Supp. 527, 532 (E.D. Okla. 1975). This definition is not very helpful because it does not state how or when a court should determine that a particular contractual term has more than one reasonable

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[7/] The parties agreed at oral argument that Oklahoma law would apply and the parties have not suggested that the law of any other jurisdiction should be applied to interpret the tolling agreements.

meaning. Nevertheless, the law of Oklahoma permits a court to look at certain categories of extrinsic evidence in order to make its initial determination of ambiguity.

There are two categories of extrinsic evidence particularly relevant in this case. First, a court may consider extrinsic evidence regarding the purpose of the contract and the circumstances surrounding its execution and performance. Amoco Production v. Lindley, 609 P.2d 733, 741 (Okla. 1980); First Nat'l Bank v. Roselle, 493 F.2d 1196, 1200 (10th Cir. 1973); 15 O.S. § 163. In other words, the Court must place itself as far as reasonably possible in the position of the parties when the contract was executed. Cities Service Oil v. Geolograph Co., 254 P.2d 775, 779 (Okla. 1953). The only way a court can obtain this contextual feeling is to consider extrinsic evidence on the issue. The Restatement states this principle as follows:

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. . . . Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. . . . But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.

Restatement, Second, of Contracts § 212, comment b.

Second, the Court may consider extrinsic evidence tending to show that there is a latent ambiguity. A seemingly unambiguous contractual term is latently ambiguous when extrinsic facts render its meaning uncertain. By definition, a court would be unaware of a latent ambiguity absent extrinsic evidence. Thus, even if the language used in the contract seems clear, extrinsic evidence may be admitted to show the existence of a latent ambiguity. In re the Estate of Sharp, 512 P.2d 160, 161-64 (Okla. 1973); Sunray Packing Co. v. Wilson, 268 P.2d 264, 267 (Okla. 1954); 3A C.J.S. Ambiguity pp. 409-10. See generally Pacific Gas, 442 P.2d at 646 n.8. The Restatement states a similar principle as follows:

> Words, written or oral, cannot apply themselves to the subject matter. . . . Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed.

Restatement, Second, Contracts § 214, comment b.

2. **The Circumstances Surrounding the Execution of the Extension Agreements and the Parties' Conduct Creates an Ambiguity.**

In the original tolling agreements, the period of forbearance was set to expire on June 8, 1993. (Exhibit "B" to Mr. Barkley's motion, ¶ 2). As the initial period of forbearance was about to expire, the parties entered into an agreement extending the period of forbearance by three months to September 8, 1993. (Exhibit "C" to Mr. Barkley's motion, 6/3/93 Letter Agreement). Four days after this extension agreement was executed, the parties attended a status conference before Magistrate Judge Jeffrey S. Wolfe at which a deadline to join additional parties was first established for September 10, 1993. See 6/7/93 Minute. The undersigned notes that this joinder deadline was set for two days after the recently-extended period of forbearance was to expire on September 8, 1993. It is a reasonable inference that the parties asked for and received this joinder deadline to coincide with the recently executed extension agreement.

One week before the period of forbearance expired on September 8, 1993, the parties again extended the period of forbearance to October 23, 1993 (i.e., the second extension agreement). (Exhibit "D" to Mr. Barkley's motion, 9/1/93 Letter Agreement). Two days later, the RTC filed an application with the Court, in which Defendants joined. [Doc. No. 59]. The joint application asked the Court to extend the joinder deadline to October 23, 1993 and set a settlement conference after September 22, 1993. The Court granted both requests. A settlement conference was set for October 22, 1993 before an adjunct settlement judge. [Doc. No. 61]. The undersigned notes that the conference was set one day prior to the October 23 joinder deadline and one day prior to the expiration of the period of forbearance. From these facts, there is a reasonable inference that the parties understood that the reason for the second extension agreement was to provide an opportunity for a settlement conference and, absent settlement, Defendants would be sued on the joinder date requested by the parties.

After receiving the order setting the settlement conference mentioned above, the parties notified the Court that they wanted Magistrate Judge John L. Wagner, and not an adjunct settlement judge, to handle the settlement conference. See 10/8/93 Minute Order. The October 22, 1993 settlement conference was stricken and a new settlement conference was set for March 7, 1994. [Doc. No. 64]. Shortly after the settlement conference was rescheduled, the parties entered into their third extension of the period of forbearance (i.e., the third extension agreement). (Exhibit "E" to Mr. Barkley's motion, 11/8/93 Letter Agreement). This time, the period of forbearance was extended to April 1, 1994. Again, it is a reasonable inference that this extension agreement was designed, as were the others, to accommodate the settlement conference and, absent settlement, to allow for some additional time after the conference to discuss settlement before Defendants would be joined.

Shortly after the parties extended the period of forbearance for the third time, Magistrate Judge Wolfe held another status conference. For some reason not apparent from the record or court file, the March 7, 1994 settlement conference was moved by the Court to November 23, 1993. See 11/18/93 Minute Order. The minute from the status conference also reflects that the Court ordered the RTC to join all additional parties by November 30, 1993 "if settlement [was] not possible. . . ." See 11/18/93 Minute. Given the parties prior conduct, a jury could reasonably conclude that what was bargained for in the third extension agreement was not an extension to April 1, but an extension to a date which would accommodate a settlement conference and a short period of time following that conference for further settlement discussions. That is, a reasonable jury could conclude that the parties were bargaining for a time frame not a specific date. So, when the March 1994 settlement conference was moved to November 1993, it would not be unreasonable to conclude that the parties understood that there would no longer be a need to delay suing Defendants until April 1994.

The settlement conference was held on November 23, 1993. At the conclusion of the conference, the RTC alleges that Magistrate Judge Wagner extended the joinder deadline from November 30, 1993 to December 15, 1993 to allow the parties more time to pursue the settlement negotiations that had begun at the conference. Although the parties continued to negotiate during this time, no settlement was reached by December 15 with Defendants. Because no settlement had been reached, the RTC joined Defendants by filing its Second Amended Complaint on the day allegedly set by Magistrate Judge Wagner for joinder of additional parties. [Doc. No. 70].

Viewing these facts and all of the inferences that can be drawn from them in the light most favorable to Plaintiff, the Court finds that the terms of the last extension agreement are "ambiguous." The last extension agreement is ambiguous in the sense that the circumstances surrounding the execution of that agreement indicate that there are two reasonable interpretations regarding the parties' intent and purpose for entering into it. The facts and permissible inferences demonstrate that Plaintiff's interpretation of the last extension agreement is reasonable. Based on the foregoing, it would be reasonable to conclude that the period of forbearance was tied closely to the opportunity to participate in a settlement conference and tied closely to the Court's joinder deadlines. It would also be reasonable to conclude, based on the parties' prior conduct, that the only reason for the last extension was to allow for a settlement conference and a short time thereafter to permit further settlement negotiations. One could also reasonably conclude that the parties understood that absent settlement, Defendants would be joined on the date set for joinder of additional parties. Given the fact that Plaintiff's and Defendant's interpretations are both reasonable in light of the surrounding circumstances, the Court cannot enter judgment as a matter of law. The issue is one for the jury.

3. Magistrate Judge Wagner's Alleged Extension of the Joinder Deadline

As discussed above, Plaintiff has alleged that Magistrate Judge Wagner, while acting as a settlement judge, extended the joinder deadline to December 15, 1993. There is no minute entry or order on file reflecting this extension. The only evidentiary material on this issue is an affidavit from Barry Beasley, the attorney representing the RTC at the settlement conference. Mr. Beasley simply states that "[a]t the settlement conference Magistrate Judge Wagner extended the date by which the RTC must join all additional parties to December 15, 1993." (Exhibit "A" to the RTC's response to Mr. Westfield's motion, ¶ 6). At the hearing on the Barkley-Westfield-Fist motions, John Clayman, who was present at the settlement conference as Mr. Westfield's attorney, agreed that Magistrate Judge Wagner did extend the joinder deadline. Defendants have presented no evidence to the contrary.

This Court's local rule 16.3(E) provides that "[a]ny statement made in the context of the settlement conference will not constitute an admission and will not be used in any form in the litigation or trial of the case." Based on this rule, Defendants argue that Plaintiff is precluded from relying on Magistrate Judge Wagner's extension of the joinder deadline. Under the circumstances of this case, the undersigned does not agree. First, no one has disputed the fact that the joinder deadline was extended. Second, if a magistrate judge issues an order, a party is not free to disregard that order simply because it was issued at a settlement conference. In terms of the language of Rule 16.3(E), the undersigned finds that an order from a magistrate judge, which extends a joinder deadline, would not be a "statement made in the context of the settlement conference."

4. Plaintiff's Defenses to and Defendants' Remedies for Breach of the Tolling Agreement

Because the undersigned has determined that summary judgment is not appropriate with respect to whether Plaintiff breached the tolling agreements, that issue will necessarily be presented to the jury. Since this issue is already headed for the jury, the undersigned sees no reason to discuss Plaintiff's defenses to breach or Defendants' remedies for breach. The undersigned finds that it would be more appropriate to address issues regarding Plaintiff's defenses and Defendants' remedies at the time jury instructions are prepared. Thus, the undersigned recommends that judgment as a matter of law not be entered with respect to any of these issues.

5. Plaintiff's Second Amended Complaint Was Properly Filed

Rule 15(a) of the Federal Rules of Civil Procedure provides that once an answer to a complaint is filed, the complaint may not be amended without leave of court. Leave is, however, to be freely granted. Mr. Fist argues that the claims added in Plaintiff's Second Amended Complaint are barred because Plaintiff filed its Second Amended Complaint without leave of court as required by Rule 15(a). The undersigned does not agree.

Mr. Fist is correct that there is no order on file permitting Plaintiff to file a Second Amended Complaint. However, the facts discussed above make it clear that Magistrate Judge Wolfe, Magistrate Judge Wagner and all interested individuals fully expected Plaintiff to file an amended complaint to add as parties those individuals who did not settle with the RTC at a settlement conference. While the authority to file the Second Amended Complaint may not have been explicit, it was certainly implicit.

As Professors Wright and Miller state,

> an untimely amended pleading served without judicial permission may be considered as properly introduced when leave to amend would have been granted had it been sought and when it does not appear that any of the parties will be prejudiced by allowing the change. Permitting an amendment without formal application to the court under these circumstances is in keeping with the overall liberal amendment policy of Rule 15(a) and the general desirability of minimizing needles formalities.

Wright & Miller, Federal Practice and Procedure: Civil 2d § 1482, p. 601-602 (1990). There appears to be no question that the RTC would have been granted leave to file its Second Amended Complaint had it asked for it. Mr. Fist has also failed to demonstrate that he was in any way prejudiced by the fact that leave was not sought. Showing prejudice would be very difficult for Mr. Fist as he was not a party to the lawsuit at the time he alleges that leave should have been sought. Thus, the undersigned finds that in keeping with the liberal amendment policies of Rule 15(a), Plaintiff's Second Amended Complaint should be admitted despite the fact that no formal application for leave was filed.

The Second Amended Complaint was filed December 15, 1993. Mr. Fist objected based on Plaintiff's failure to seek leave for the first time in a brief filed April 18, 1996 (i.e., almost 2½ years later). Between December 15, 1993 and April 18, 1996, Mr. Fist has filed several pleadings in defense of this case. The undersigned finds, therefore, that any objections Mr. Fist might have had regarding Plaintiff's failure

to seek leave to amend have been waived. See Arp v. U.S., 244 F.2d 571, 574 (10th Cir. 1957), cert. denied 355 U.S. 826 (1957) (holding that a substantive response to a procedurally improper pleading, without an objection based on the procedural irregularity, waives any procedural objections).

CONCLUSION

The undersigned finds that based on the conduct of the parties and the circumstances existing at the time of execution, the last agreement extending the period of forbearance under the tolling agreements is ambiguous. That is, the last extension agreement is subject to two reasonable interpretations and the jury must choose between these two interpretations. Therefore, the undersigned recommends that the Barkley-Westfield-Fist motions for summary judgment be **DENIED**. [Doc. Nos. 88, 93 & 169].

TIME FOR OBJECTIONS

If the parties so desire, they may file with the District Judge assigned to this case, within 10 days from the date they are served with a copy of this Report and Recommendation, objections to the undersigned's recommended disposition. See 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b).

Dated this 9 day of October 1996.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on eac' of the parties hereto by mailing the same to them or to their attorneys of record on the

____ day of _____, 19___

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
Plaintiff,	)
vs.	)
GARY STORM aka GARY W. STORM aka GARY WAYNE STORM; MARILYN STORM aka MARILYN S. STORM aka MARILYN SUZANNE STORM; PAT NOONAN; PAM NOONAN; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; RUSSELL D. PETERSON; CHASE MANHATTAN MORTGAGE CORPORATION successor by merger to TROY & NICHOLS, INC.; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)
Defendants.	) Civil Case No. 96-C 0068C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9th day of October, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, RUSSELL D. PETERSON, appears *pro se*; and the Defendants, GARY STORM aka Gary W. Storm aka Gary Wayne Storm, Marilyn Storm aka Marilyn S. Storm

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aka Marilyn Suzanne Storm, PAT NOONAN, PAM NOONAN and CHASE MANHATTAN MORTGAGE CORPORATION successor by merger to Troy & Nichols, Inc., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, PAT NOONAN, signed a Waiver of Summons on February 9, 1996; that the Defendant, PAM NOONAN, signed a Waiver of Summons on February 7, 1996; that the Defendant, RUSSELL D. PETERSON, signed a Waiver of Summons on February 6, 1996; that the Defendant, CHASE MANHATTAN MORTGAGE CORPORATION successor by merger to Troy & Nichols, Inc., was served a copy of Summons and Complaint on February 9, 1996, by Certified Mail.

The Court further finds that the Defendants, GARY STORM aka Gary W. Storm aka Gary Wayne Storm and MARILYN STORM aka Marilyn S. Storm aka Marilyn Suzanne Storm, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 9, 1996, and continuing through June 13, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, GARY STORM aka Gary W. Storm aka Gary Wayne Storm and MARILYN STORM aka Marilyn S. Storm aka Marilyn Suzanne Storm, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears

from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendants, GARY STORM aka Gary W. Storm aka Gary Wayne Storm and MARILYN STORM aka Marilyn S. Storm aka Marilyn Suzanne Storm. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on February 14, 1996; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on February 16, 1996; that the Defendant, CITY OF BROKEN ARROW, OKLAHOMA, filed its Answer on February 27, 1996; that the Defendant, RUSSELL D. PETERSON, filed his Answer on March 5, 1995; and that the Defendants, GARY STORM aka Gary W. Storm aka Gary Wayne Storm, MARILYN STORM aka Marilyn S. Storm aka Marilyn Suzanne Storm, PAT NOONAN, PAM NOONAN and CHASE MANHATTAN MORTGAGE CORPORATION successor by

merger to Troy & Nichols, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, GARY STORM is one and the same person as Gary W. Storm and Gary Wayne Storm and will hereinafter be referred to as "GARY STORM." The Defendant, MARILYN STORM, is one and the same person as Marilyn S. Storm and Marilyn Suzanne Storm, and will hereinafter be referred to as "MARILYN STORM." The Defendants, GARY STORM and MARILYN STORM, were granted a divorce in case number FD 94-2400 on October 26, 1994, in Tulsa County, Oklahoma. The Defendants, GARY STORM and MARILYN STORM, are both single unmarried persons.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> LOT SEVENTEEN (17), BLOCK FIVE (5), SOUTH PARK SOUTH 2ND, AN ADDITION TO THE CITY OF BROKEN ARROW, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on October 13. 1987, PATRICK J. NOONAN and PAMELA L. NOONAN, executed and delivered to MidAmerica Federal Savings and Loan Association, their mortgage note in the amount of $70,250.00, payable in monthly installments, with interest thereon at the rate of Nine and one-half percent (9½%) per annum.

The Court further finds that as security for the payment of the above-described note, PATRICK J. NOONAN and PAMELA L. NOONAN, Husband and Wife, executed and

delivered to MidAmerica Federal Savings and Loan Association, a mortgage dated October 13, 1987, covering the above-described property. Said mortgage was recorded on October 20, 1987, in Book 5058, Page 2577, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 14, 1991, Local America Bank of Tulsa, F.S.B. successor in interest to MidAmerica Federal Savings and Loan Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., his successors and assigns. This Assignment of Mortgage was recorded on August 16, 1991, in Book 5342, Page 2356, in the records of Tulsa County, Oklahoma. A Corrected Assignment, dated July 15, 1993, was recorded on July 19, 1993, in Book 5524, Page 650, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 27, 1990, PATRICK J. NOONAN AND PAMELA L. NOONAN, HUSBAND AND WIFE, executed a Warranty Deed to CHICAGO TITLE INSURANCE COMPANY, recorded on August 13, 1990, in Book 5279, Page 2091, in the records of Tulsa County, Oklahoma. Defendants, GARY STORM and MARILYN STORM, are the current owners of the property by virtue of a General Warranty Deed, dated July 2, 1990, and recorded on August 13, 1990, in Book 5170, Page 2092, in the records of Tulsa County, Oklahoma. The Defendants, GARY STORM and MARILYN STORM, are the currents assumptors of the subject indebtedness.

The Court further finds that on January 28, 1991, the Defendants, GARY STORM and MARILYN STORM, filed their petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 91-00185-C, which was discharged on May 16, 1991, and closed on July 19, 1991.

The Court further finds that on August 1, 1991, the Defendants, GARY STORM and MARILYN STORM, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on February 1, 1992 and May 26, 1992.

The Court further finds that the Defendants, GARY STORM and MARILYN STORM, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, GARY STORM and MARILYN STORM, are indebted to the Plaintiff in the principal sum of $97,299.03, plus interest at the rate of 9½ percent per annum from March 14, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $70.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $69.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of $68.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $2,953.06 which became a lien on

the property as of November 19, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, RUSSELL D. PETERSON, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $1,733.75 which became a lien on the property as of June 30, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, OKLAHOMA, claims no right, title or interest to the subject property except insofar as it is the owner of certain easements to the duly recorded plat.

The Court further finds that the Defendants, GARY STORM aka Gary W. Storm aka Gary Wayne Storm, MARILYN STORM aka Marilyn S. Storm aka Marilyn Suzanne Storm, PAT NOONAN, PAM NOONAN and CHASE MANHATTAN MORTGAGE CORPORATION successor by merger to Troy & Nichols, Inc., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, GARY

STORM and MARILYN STORM, in the principal sum of $97,299.03, plus interest at the rate of 9½ percent per annum from March 14, 1995 until judgment, plus interest thereafter at the current legal rate of 5.90 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $207.00, plus costs and interest, for personal property taxes for the years 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $2,953.06, plus accrued and accruing interest, for state income taxes, plus the costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, RUSSELL D. PETERSON, have and recover judgment in the amount of $1,733.75, plus costs of the action accrued and accruing, for a judgment, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, OKLAHOMA, has no right, title or interest to the subject property except insofar as it is the owner of certain easements to the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, GARY STORM, MARILYN STORM, PAT NOONAN, PAM NOONAN,

CHASE MANHATTAN MORTGAGE CORPORATION successor by merger to Troy & Nichols, Inc., and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, GARY STORM and MARILYN STORM, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $70.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $2,953.06, plus accrued and accruing interest, state income taxes which are currently due and owing.

Sixth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $69.00, personal property taxes which are currently due and owing.

Seventh:

In payment of Defendant, RUSSELL D. PETERSON, in the amount of $1,733.75, plus costs of the action accrued and accruing, for judgment.

Eighth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $68.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

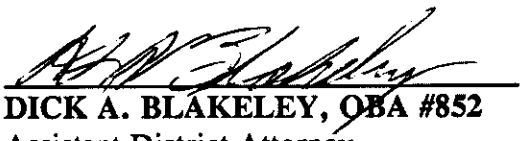
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

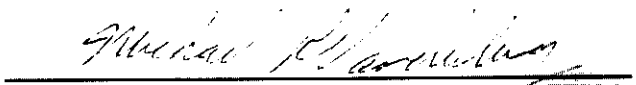
STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, OK 73152-3248
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission



MICHAEL R. VANDERBURG, OBA #9180
City of Broken Arrow, Oklahoma
220 S. First Street
Broken Arrow, OK 74012
Attorney for Defendant,
City of Broken Arrow, Oklahoma

RUSSELL D. PETERSON, OBA #7082
107 West Commercial
Broken Arrow, OK 74012
(918) 251-5335
Pro Se Defendant

Judgment of Foreclosure
Civil Action No. 96 C 0068C

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DALE WAYNE WILLIAMS,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 93-C-1074-E

ORDER

At the pretrial conference on October 3, 1996, Plaintiff Dale Wayne Williams orally moved to dismiss this action with prejudice. Defendants concurred with Plaintiff's motion.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is hereby DISMISSED WITH PREJUDICE.

SO ORDERED THIS 7th day of October, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAREN REIL,

Plaintiff,

vs.

EARNEST GRANT, GERALD GORMAN, BEVERLY HILL, and DAVID WILMOTH, Each Individually and As Duly Elected Trustees of the BOARD OF TRUSTEES OF THE TOWN OF FAIRLAND, OKLAHOMA and Also As Duly Appointed TRUSTEES OF THE FAIRLAND PUBLIC WORKS AUTHORITY and the TOWN OF FAIRLAND, OKLAHOMA

Defendants.

No. 92-C-513E

ORDER

Before the Court is the motion for summary judgment submitted by EARNEST GRANT, GERALD GORMAN, BEVERLY HILL, and DAVID WILMOTH, Each Individually and As Duly Elected Trustees of the BOARD OF TRUSTEES OF THE TOWN OF FAIRLAND, OKLAHOMA and Also As Duly Appointed TRUSTEES OF THE FAIRLAND PUBLIC WORKS AUTHORITY and the TOWN OF FAIRLAND, OKLAHOMA, (collectively "DEFENDANTS"), against Plaintiff KAREN REIL ("REIL"). For the reasons set forth below, Defendants' motion for summary judgment is granted in part and denied in part.

I. UNDISPUTED FACTS

In 1987, Plaintiff KAREN REIL ("REIL") was appointed to fill the unexpired term of the

(36)

elected office of town clerk in Fairland, Oklahoma. At that time, a city ordinance which described the town clerk's duties indicated that the compensation for the position was $150.00 a month. However, the person holding the office of town clerk had received compensation of $500.00 a month since a Town Board of Trustees ("Board") action in 1980. At the time she accepted the 1987 appointment, REIL was verbally informed that her compensation for the position would also be $500.00 a month. REIL also learned that the town clerk performed additional duties for the Fairland Public Works Authority ("PWA"); the PWA duties were not mentioned in the city ordinance.

In April 1987, three months after receiving the appointment, the community elected REIL as town clerk for the next four year term. The following year, REIL undertook the additional duties of performing as town court clerk, for which, the Board voted to increase REIL's monthly compensation by $100.00.

On August 5, 1990, REIL wrote to the Board and requested the Board to increase her monthly compensation by an additional $300.00. REIL requested the increase in salary for performing as secretary of the PWA. Furthermore, if the salary increase she requested was denied, REIL suggested that the Board find someone else to perform the duties for PWA. The Board subsequently denied REIL's request and REIL ceased performing the duties relating to the PWA.

In October 1990, the Board reduced REIL's monthly compensation by $350.00. In November 1990, the Board also withdrew the $100.00 monthly compensation REIL received for acting as town court clerk. The two salary reductions left REIL with compensation of $150.00 a month, which is the amount the town ordinance provided for the position of town clerk.

In December 1990, the Board filed a writ of mandamus in the District Court for Ottawa

County (Pl.'s Resp. to Def.s' Mot. for Summ. J., Docket 31, Ex. I.). In the writ, the Board sought performance of the town clerk's duties described in the town ordinance, and the additional duties relating to the PWA. However, prior to the February 1991 hearing, the Board withdrew the writ. REIL did not file as a candidate for the Town Clerk position for the 1991 election, and her term in office ended in April 1991.

II. PROCEDURAL HISTORY

REIL filed her complaint on June 11, 1992 alleging DEFENDANTS violated her rights under 42 U.S.C. § 1983 by depriving her of property rights and conspiring to deprive her of her position as town clerk. Additionally, REIL asserts an equal protection and a First Amendment claim. REIL also alleges two state claims: abuse of process and defamation. After two unsuccessful attempts to arrive at a settlement on this matter, DEFENDANTS subsequently filed a Motion For Summary Judgment on all of REIL's claims (Docket no. 28). This Motion is now before the Court.

III. DISCUSSION

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56 (c). In determining whether summary judgment is appropriate, the Court must view the evidence in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). However, "[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which

that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317(1986).

A. REIL's federal claims

REIL asserts two claims related to 42 U.S.C. § 1983: deprivation of property and conspiracy to deprive her of the office of town clerk. REIL's deprivation of property claim is based on the Board's actions that reduced her salary while she was town clerk. DEFENDANTS contend that REIL's deprivation of property claim must fail for two reasons. First, they argue they have not deprived REIL of any property interest. DEFENDANTS assert that, because of the city ordinance, REIL was only entitled to a monthly salary of $150.00. They claim the additional compensation REIL received, which was discontinued in 1990, was paid for REIL's additional duties relating to the PWA, not her duties as town clerk. Consequently, DEFENDANTS assert that they had the right to discontinue paying REIL this additional compensation when REIL ceased performing these duties. Second, DEFENDANTS argue that even if the additional salary constituted a property interest, they did not violate 42 U.S.C. § 1983 because REIL received due process. They contend due process was afforded REIL at the open meetings of the Board where her salary reductions were decided. In response, REIL argues that the additional compensation was part of her salary as town clerk, not additional compensation for her performance as secretary for the PWA. Additionally, REIL claims she was not afforded due process because the Board was not an impartial tribunal.

REIL's deprivation of property claim depends on whether her initial compensation was provided her for performing two separate functions, or performing the responsibilities of the office of town clerk. The Court finds that this question is a material fact that is in dispute. Furthermore, the fact that REIL's salary was reduced by the Board in open meeting is not by itself determinative

of due process. Due process requires a hearing before an impartial tribunal. Miller v. City of Mission, 705 F.2d 368, 372 (10th Cir. 1983). Accordingly, DEFENDANTS' motion for summary judgment on REIL's §1983 claim for deprivation of property interest is denied.

In her second claim under 42 U.S.C. §1983, REIL contends that the DEFENDANTS conspired to deprive her of the office of town clerk. Although not identified as such, this claim is one under 42 U.S.C. § 1985, the section which provides for conspiracy claims grounded in civil rights violations. However, the Court concludes that REIL cannot establish conspiracy under this section. Section 1985 (1), which specifically addresses interference with or deprivation of an official's elected office, is not available to REIL as the section applies only to federal officials. Neither has REIL established conspiracy under the more general subsection, §1985(3). To establish a conspiracy under §1985(3), REIL is required to demonstrate: "(1) the existence of a conspiracy (2) intended to deny [her] equal protection under the laws or equal privileges and immunities of the laws (3) resulting in an injury or deprivation of federally-protected rights, and (4) an overt act in furtherance of the object of conspiracy." Murray v. City of Sapulpa, 45 F.3d 1417 (10th Cir. 1995). "The motivation aspects of [section] 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." Griffen v. Breckenridge, 403 U.S. 88, 102 (1971). As REIL has introduced no evidence that the conspiracy was motivated by a "invidiously discriminatory animus" toward a protected class, or that she is a member of such a class, REIL has failed to establish a conspiracy claim.

Neither has REIL established violation of her rights of equal protection and free speech. REIL's equal protection claim fails for the same reason as her conspiracy claim; she did not establish

that she was a member of a protected class and that she was being discriminated against for that reason. REIL's First Amendment claim also fails because she did not establish that her speech was a public, rather than only a private concern. Connick v. Meyers, 461 U.S. 138, 147 (1983).

Finally, the individual DEFENDANTS assert the affirmative defense of qualified immunity. DEFENDANTS note that individual officials are immune to suit unless they understood that their complained of actions violated clearly established constitutional rights and REIL has failed to demonstrate such a violation. REIL contends that the individual DEFENDANTS have violated her clearly established right under Okla. Const. art. 23, §10 which prohibits the reduction of the salary of an elected official.

The asserted violation of the Oklahoma Constitution turns on the question of whether the $350 "additional" salary is part of the "salary or emoluments" of the office of town clerk.[1] As this question is in dispute, it is properly left for the trier of fact.[2] If the trier of fact determines that the additional compensation was part of the emoluments of the office, the salary reduction would violate §23 and the individual DEFENDANTS may not be entitled to qualified immunity.

B. REIL's state claims

REIL also alleges abuse of process and defamation. DEFENDANTS claim they are exempt

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[1]The Oklahoma Constitution provides: "Except where otherwise provided in this Constitution, in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term in office, unless by operation of law enacted prior to such election or appointment . . . " Okla. Const. art 23, § 10.

[2]DEFENDANTS dispute REIL's contention that the reduction in salary violates Okla. Const. art 23, § 10. Rather, DEFENDANTS contend that a municipality has the discretion to alter an official's salary if the official performs, or discontinues to perform, additional duties that are not germane to the elected office. See e.g. Breeden v. Nigh, 441 P.2d 981, (Okla. 1968). DEFENDANTS now urge that REIL's additional duties were not germane to the office, although in their writ they described these duties as "inextricably related" to the duties of the town clerk (Pl.'s Resp. to Def. Mot. for Summ. J., Docket 31, Ex. I. para. 4).

from liability as participants in a legislative function under Oklahoma's Governmental Tort Claims Act, Okla. Stat. tit. 51, § 155(1). Furthermore, DEFENDANTS argue that REIL has not introduced evidence supporting her abuse of process claim, and her defamation claim is barred because she did not file notice with DEFENDANTS as required under the Oklahoma Governmental Tort Claims Act, Okla. Stat tit. 51, § 156.

To establish an abuse of process claim, REIL must establish that process was issued, that it was issued for an ulterior purpose, and the use of the process was a willful act not proper in the regular course of the proceeding. Gore v. Taylor, 792 P.2d 432, 435 (Okla. Ct. App. 1990). The Court finds the REIL has failed to introduce evidence that establishes the elements of abuse of process. In addition, as REIL does not dispute that she failed to file notice of her defamation claim, §156 of the Oklahoma Governmental Tort Claims Act bars her from now asserting this claim. Finally, because REIL's state claims fail, it is unnecessary for the Court to consider whether DEFENDANTS are exempt from REIL's state claims under §155.

IV. CONCLUSION

ACCORDINGLY, IT IS ORDERED that DEFENDANTS' motion for summary judgment is **granted** as to REIL's conspiracy, equal protection, First Amendment, defamation and abuse of process claims. DEFENDANTS' motion for summary judgment is **denied** as to REIL's 42 U.S.C. § 1983 deprivation of property claim.

IT IS SO ORDERED, this 8TH day of October, 1996.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONNELL HANEY,

Plaintiff,

vs.

ROBERT JOHNSON, and STANLEY GLANZ,

Defendants.

No. 96-CV-522-H

ORDER

On August 6, 1996, the Court granted Defendants' motion for enlargement of time within which to file an answer or response to Plaintiff's complaint. Defendants have failed to comply with the above order and Plaintiff has not indicated that he wishes to continue prosecution of this action

ACCORDINGLY, IT IS HEREBY ORDERED that this action is ADMINISTRATIVELY CLOSED. In the event Plaintiff wishes to continue prosecution of this action he should notify the Court by written motion within fifteen (15) days.

IT IS SO ORDERED this 7TH day of OCTOBER, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

6

ENTERED ON DOCKET

DATE 10-9-96

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 4:94-CV-01094
	)	
STEVEN BALE, JANICE BALE, EVELYN JEAN BALE, SJNS TRUST, FAITH ENTERPRISE TRUST, CORNERSTONE BANK, and GREEN COUNTRY FEDERAL SAVINGS & LOAN ASSOCIATION,	)	
	)	
Defendants.	)	

FILED

OCT 08 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Upon motion of the plaintiff, United States of America, to dismiss the lien foreclosure and fraudulent conveyance portion of the above case, it is hereby

ORDERED that the above case be dismissed without prejudice. This dismissal in no way affects the judgment previously entered on August 12, 1996, or the federal tax liens on the property at issue in this litigation. The parties are to bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.

Dated: October 7, 1996

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN PAUL HANEY, JR.,

Petitioner,

vs. No. 96-CV-781-H

TULSA COUNTY DISTRICT COURT, and STATE OF OKLAHOMA,

Respondents.

ORDER

On August 23, 1996, Petitioner filed the instant habeas corpus action pursuant to 28 U.S.C. §2241(c)(3) along with a motion for leave to proceed in forma pauperis. Petitioner seeks to attack felony charges presently pending against him in Tulsa County District Court, case number CF-91-91. He contends that the Tulsa Police Department violated his constitutional rights during an initial interrogation. He further alleges he was forced to provide samples of his hair and bodily fluids pursuant to a court order.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, a petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by

4

allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

In the instant case, Petitioner has not exhausted his state remedies. As Petitioner acknowledges charges are presently pending against him in Tulsa County District Court. Therefore, this action must be dismissed without prejudice to it being reasserted after Petitioner has fully exhausted his state remedies by presenting all of his claims to the district court and the Court of Criminal Appeals. See Capps v. Sullivan, 13 F.3d 350, 354 n.2 (10th Cir. 1993) (addressing exhaustion of state remedies of pre-trial claims).

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motions for leave to proceed in forma pauperis and to amend (Docket #2 and #3) are GRANTED. This action is hereby DISMISSED WITHOUT PREJUDICE for failure to exhaust state remedies. The Clerk shall MAIL to Petitioner a copy of his petition and motion to amend.

IT IS SO ORDERED this 7TH day of October, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 10-9-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY R. ZARLEY aka
GARY ZARLEY aka G.R. ZARLEY;
CELESTE L. ZARLEY aka C.L.
ZARLEY aka CELESTE ZARLEY;
STATE OF OKLAHOMA ex rel.
OKLAHOMA TAX COMMISSION;
STATE OF OKLAHOMA ex rel.
OKLAHOMA EMPLOYMENT SECURITY
COMMISSION; COUNTY TREASURER,
Tulsa County, Oklahoma; and
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

OCT 08 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 96-C 123H

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

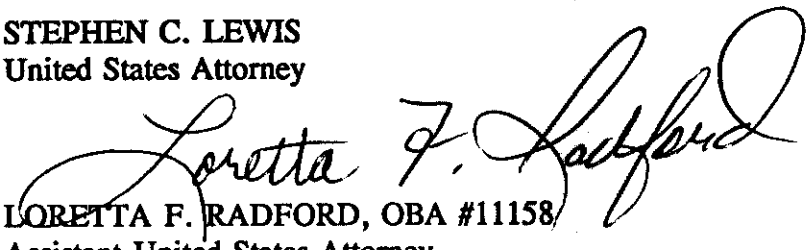
Dated this 7TH day of October, 1996.

UNITED STATES DISTRICT JUDGE

12

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 3 - 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CLINTON E. TRUNDLE,

Plaintiff,

vs.

DUAYNE D. MAHONE, DEBOER, INC., and VAN LINER INS. COMPANY,

Defendants.

Case No. 96-C-372-BU

ENTERED ON DOCKET

DATE OCT 9 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 8th day of October, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 8 - 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CLINTON E. TRUNDLE,

Plaintiff,

vs.

DUAYNE D. MAHONE, DEBOER, INC., and VAN LINER INS. COMPANY,

Defendants.

Case No. 96-C-372-BU

ENTERED ON DOCKET
DATE OCT 9 1996

ORDER

In light of the parties' settlement and compromise of this matter, the Court **DECLARES MOOT** Defendant's Motion to Join Necessary Party (Docket Entry #11).

Entered this 8th day of October, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

OCT 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY L. BACON,

Defendant.

CIVIL ACTION NO. 96-CV-724E

ENTERED ON DOCKET
DATE OCT 0 8 1996

AGREED JUDGMENT

This matter comes on for consideration this 4th day of Oct, 1996, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Mary L. Bacon, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Mary L. Bacon, acknowledged receipt of Summons and Complaint on 8-23-96. The Defendant has not filed an Answer but in lieu thereof has agreed that Mary L. Bacon is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Mary L. Bacon in the principal amount of $1,283.54, plus administrative costs in the amount of $6.75, plus accrued interest in the amount of $192.81, plus interest thereafter at the rate of 8% per annum until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the

(3)

principal amount of $1,283.54 plus administrative costs in the amount of $6.75, plus accrued interest in the amount of $192.81, plus interest thereafter at the rate of 8% per annum until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED:

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

LORETTA F. RADFORD
Assistant United States Attorney

MARY L. BACON

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
DON N. WAYMAN aka DON NOLAN WAYMAN; CHERYL J. WAYMAN aka CHERYL JEAN WAYMAN; FEDERAL DEPOSIT INSURANCE CORPORATION, as liquidating agent for FIRST STATE BANK OF OILTON, Oilton, OK, and also in its corporate capacity; DIVERSIFIED FINANCIAL SYSTEMS, LP; COUNTY TREASURER, Creek County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma,	)
	)
Defendants.	)

FILED
OCT 7 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 96-CV 151E

ENTERED ON DOCKET
OCT 0 8 1996
DATE

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

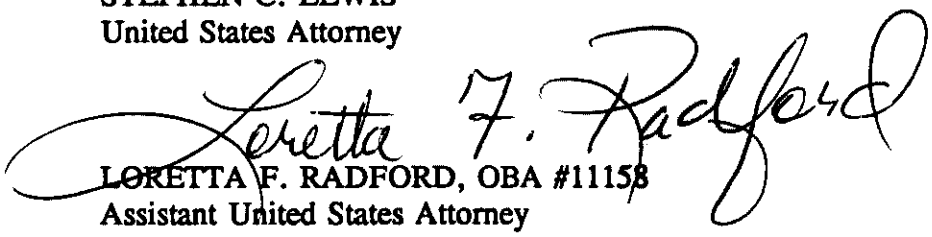
Dated this 4th day of October, 1996.

UNITED STATES DISTRICT JUDGE

(4)

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARK A. WILLIAMS; UNKNOWN SPOUSE IF ANY OF MARK A. WILLIAMS; WILLIAM A. WILLIAMS; UNKNOWN SPOUSE IF ANY OF WILLIAM A. WILLIAMS; JANICE P. TURNAGE; UNKNOWN SPOUSE IF ANY OF JANICE P. TURNAGE; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	**Civil Case No. 96CV 164B**
	)	
Defendants.	)	

ORDER

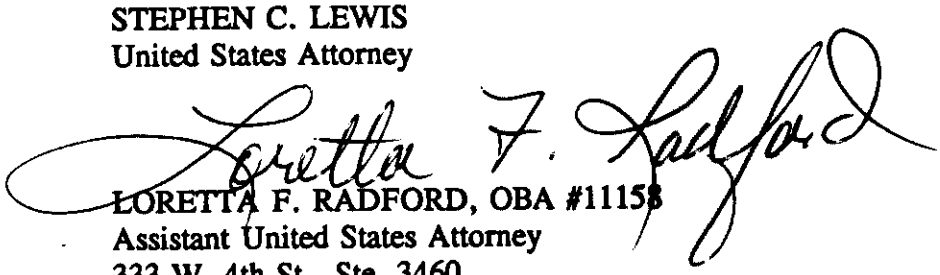
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 7th day of Oct., 1996.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
on behalf of the Secretary of Housing and Urban Development and Small Business Administration,

Plaintiff,

v.

MICHAEL RAY EARNHARDT
aka Mike Earnhardt;
SPOUSE, if any, OF MICHAEL RAY EARNHARDT
aka Mike Earnhardt;
DEBRA ANN BLEVENS fka Debra Ann Earnhardt;
SPOUSE, if any, OF DEBRA ANN BLEVENS
fka Debra Ann Earnhardt;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE OCT - 8 1996

CIVIL ACTION NO. 95-CV-1191-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7 day of Oct, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Michael Ray Earnhardt aka Mike Earnhardt; Spouse, if any, of Michael Ray Earnhardt aka Mike Earnhardt; Debra Ann Blevens fka Debra Ann Earnhardt; and Spouse, if any, of Debra Ann Blevens fka Debra Ann Earnhardt, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Michael Ray Earnhardt aka Mike Earnhardt**, executed a Waiver of Service of Summons on December 26, 1995; that the Defendant, **Debra Ann Blevens fka Debra Ann Earnhardt**, executed a Waiver of Service of Summons on January 1, 1996.

The Court further finds that the Defendants, **Spouse, if any, of Michael Ray Earnhardt aka Mike Earnhardt and Spouse, if any, of Debra Ann Blevens fka Debra Ann Earnhardt**, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 7, 1996, and continuing through July 12, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Spouse, if any, of Michael Ray Earnhardt aka Mike Earnhardt and Spouse, if any, of Debra Ann Blevens fka Debra Ann Earnhardt**, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Spouse, if any, of Michael Ray Earnhardt aka Mike Earnhardt and Spouse, if any, of Debra Ann Blevens fka Debra Ann Earnhardt.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development and Small Business Administration, and their attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma,

through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on December 12, 1995; that the Defendants, **Michael Ray Earnhardt aka Mike Earnhardt; Spouse, if any, of Michael Ray Earnhardt aka Mike Earnhardt; Debra Ann Blevens fka Debra Ann Earnhardt; and Spouse, if any, of Debra Ann Blevens fka Debra Ann Earnhardt**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 6, 1994, Michael Ray Earnhardt aka Mike Earnhardt filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 94-02616-W. The real property subject to this foreclosure action described below was listed in Schedule A and was therefore a part of the estate. On December 30, 1994, debtor was discharged of all dischargeable debts. Subsequently, Case No. 94-02616-W was closed on March 2, 1995.

The Court further finds that this is a suit based upon certain mortgage notes and for foreclosure of mortgages securing said mortgage notes upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-six (26), Block Thirteen (13), SHANNON PARK 5th ADDITION, an addition in the City and County of Tulsa, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on June 28, 1979, Michael Ray Earnhardt, Arthur Earnhardt and Vida Earnhardt executed and delivered to First Continental Mortgage Co. their mortgage note in the amount of $35,400.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, Michael Ray Earnhardt, a single person, and Arthur Earnhardt and Vida Earnhardt, husband and wife, executed and delivered to First Continental Mortgage Co., a real estate mortgage dated June 28, 1979, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on July 5, 1979, in Book 4411, Page 538, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 6, 1987, Commonwealth Savings Association successor by merger to First Continental Mortgage Co. assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America L. P. This Assignment was recorded on June 18, 1987, in Book 5032, Page 340, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 31, 1989, Commonwealth Mortgage Company of America, L. P., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment was recorded on June 8, 1989, in Book 5187, Page 2465, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 6, 1984, Arthur Earnhardt and Vida Earnhardt, husband and wife, executed a Quit-Claim Deed coveying all right, title and interest in the subject real property to Michael Ray Earnhardt, a single person. This deed was recorded on July 6, 1984, in Book 4802, Page 1336 in the records of Tulsa County, Oklahoma.

The Court further finds that on March 15, 1989, Mike Earnhardt entered into an agreement with the Plaintiff, United States of America on behalf of the Secretary of Housing and Urban Development, lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on April 23, 1990.

The Court further finds that on July 31, 1984, Michael Ray Earnhardt executed and delivered to the United States of America on behalf of the Small Business Administration his promissory note in the amount of $7,000.00, payable in monthly installments, with interest thereon at the rate of 4 percent per annum.

The Court further finds that as security for the payment of the above-described note, Michael Ray Earnhardt executed and delivered to the United States of America on behalf of the Small Business Administration a real estate mortgage dated July 30, 1984, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on July 30, 1984, in Book 4806, Page 2500, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **Michael Ray Earnhardt aka Mike Earnhardt**, made default under the terms of the aforesaid notes and mortgages, as well

as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Michael Ray Earnhardt aka Mike Earnhardt**, is indebted to the Secretary of Housing and Urban Development in the principal sum of $32,530.96, plus administrative charges in the amount of $905.52, plus penalty charges in the amount of $241.48, plus accrued interest in the amount of $18,055.25 as of February 1, 1995, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $462.03 ($379.03 publication fees, $75.00 fee for evidentiary affidavit, $8.00 fee for recording Notice of Lis Pendens); and that the Defendant, **Michael Ray Earnhardt aka Mike Earnhardt**, is indebted to the Small Business Administration in the principal sum of $4,851.73, plus accrued interest in the amount of $90.39 as of June 30, 1993, plus interest accruing thereafter at the rate of 4 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $445.00, plus penalties and interest, for the year 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the total amount of $40.00, plus penalties and interest

(see table below). Said liens are inferior to the interest of the Plaintiff, United States of America.

Personal Property Taxes	Tax Year	Amount	Date Docketed
93-03-3183080	1993	$20.00	06/23/94
92-03-3177410	1992	$20.00	06/25/93

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, **Michael Ray Earnhardt aka Mike Earnhardt; Spouse, if any, of Michael Ray Earnhardt aka Mike Earnhardt; Debra Ann Blevens fka Debra Ann Earnhardt; and Spouse, if any, of Debra Ann Blevens fka Debra Ann Earnhardt**, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Michael Ray Earnhardt aka Mike Earnhardt**, in the principal sum of $32,530.96, plus administrative charges in the amount of $905.52, plus penalty charges in the amount of $241.48, plus accrued interest in the amount of **$18,055.25 as** of February 1, 1995, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the

current legal rate of 5.90 percent per annum until paid, plus the costs of this action in the amount of $462.03 ($379.03 publication fees, $75.00 fee for evidentiary affidavit, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of Small Business Administration, have and recover judgment in rem against the Defendant, **Michael Ray Earnhardt aka Mike Earnhardt**, in the principal sum of $4,851.73, plus accrued interest in the amount of $90.39 as of June 30, 1993, plus interest accruing thereafter at the rate of 4 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.90 percent per annum until paid, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, including the costs of this action and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $445.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the

total amount of $40.00, plus penalties and interest, for personal property taxes for the years 1992 and 1993 as shown in the table above, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Michael Ray Earnhardt aka Mike Earnhardt; Spouse, if any, of Michael Ray Earnhardt aka Mike Earnhardt; Debra Ann Blevens fka Debra Ann Earnhardt; Spouse, if any, of Debra Ann Blevens fka Debra Ann Earnhardt; and Board of County Commissioners, Tulsa County, Oklahoma,** have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Michael Ray Earnhardt aka Mike Earnhardt**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma, for ad valorem taxes;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma, for personal property taxes.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

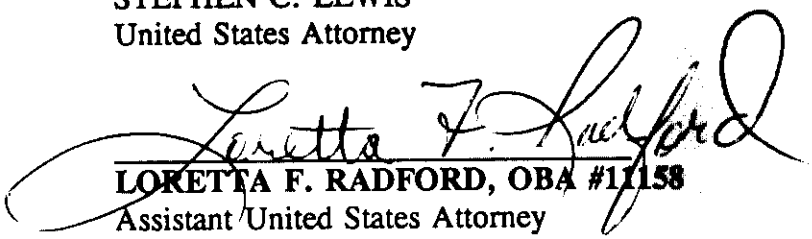
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-CV-1191-B

LRF:cm

4

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE OCT - 7 1996
NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FERN FRIEND AND LOREN FRIEND	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 95-C-774B
	)	
ARROWHEAD STATOR & ROTOR, INC., et al.	)	
	)	
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE OCT 8 1996

ORDER OF DISMISSAL

This matter comes before the Court on the Stipulation of Dismissal by plaintiffs, Fern Friend and Loren Friend, and defendant, Ford Motor Company. Having considered the Stipulation, the Court finds that plaintiffs' claims against Ford Motor Company should be and are hereby dismissed with prejudice to the filing of a future action, with each party to bear their own attorneys' fees and costs in this action.

JUDGE OF THE DISTRICT COURT

4

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHNNY WEINS aka JOHNNY R. WEINS; TINA WEINS aka TINA YVONNE WEINS aka TINY Y. WEINS; JAMES R. HAYS, P.C.; TULSA ADJUSTMENT BUREAU, INC.; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	**Civil Case No. 95C 700B**
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE OCT 8 1996

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

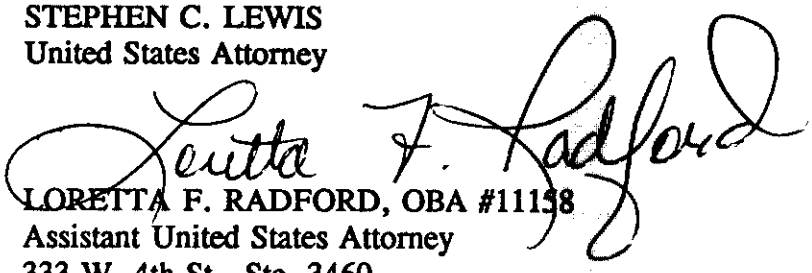
Dated this 7 day of Oct, 1996.

UNITED STATES DISTRICT JUDGE

10

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate capacity, as Successor in Interest to BANK OF COMMERCE & TRUST COMPANY, Tulsa, Oklahoma

Plaintiff,

vs.

ROBERT A. FRANDEN,

Defendant.

FILED

OCT 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 95-C-657-K

ENTERED ON DOCKET

DATE OCT 0 8 1996

JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE

COMES NOW, the Plaintiff, Federal Deposit Insurance Corporation in its Corporate capacity as successor in interest to Bank of Commerce & Trust Company, Tulsa, Oklahoma, and the Defendant, Robert A. Franden, by their respective counsel, and pursuant to Rule 41(a)(1)(ii), hereby stipulate that the above-entitled cause be dismissed with prejudice.

GARY G. LYON OBA #005585
5080 Spectrum Drive, Suite 400W
Dallas, Texas 75248
Tel: (214) 788-7696
Fax: (214) 788-7686

ATTORNEY FOR FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AS SUCCESSOR IN INTEREST TO BANK OF COMMERCE & TRUST COMPANY, TULSA, OKLAHOMA

JODY R. NATHAN OBA #011685
FELDMAN, FRANDEN, WOODARD, FARRIS & TAYLOR
525 South Main Street, Suite 1400
Tulsa, Oklahoma 74103-4523
Tel: (918) 583-7129
Fax: (918) 584-3814

ATTORNEY FOR ROBERT A. FRANDEN

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	
Plaintiff,	
vs.	
LARRY WESTON aka LARRY J. WESTON; LESLIE F. CAVANAGH aka LESLIE CAVANAGH; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	
Defendants.	**Civil Case No. 96CV 166K**

ENTERED ON DOCKET
DATE OCT 07 1996

FILED
OCT 4 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

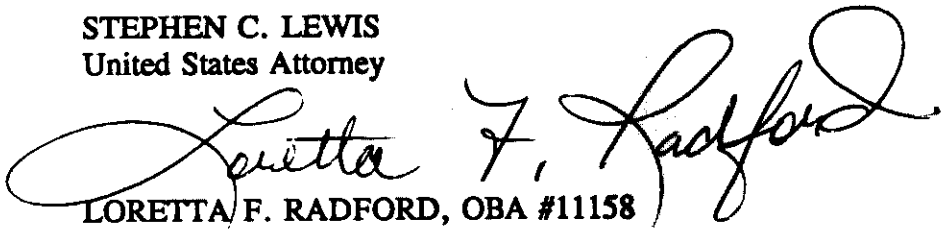
Dated this 4 day of October, 1996.

UNITED STATES DISTRICT JUDGE

9

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PERCY EDMUNDSON,

Plaintiff,

vs.

DAN FULLER, et al.,

Defendants.

No. 95-CV-1154-K

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on September 9, 1996. (docket #12.) Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1]

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss or for summary judgment (doc. #12) is granted and the above captioned case is dismissed without prejudice at this time.

SO ORDERED THIS 3 day of October, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

14

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERRY WAYNE HAMILTON,

Plaintiff,

vs.

STANLEY GLANZ,

Defendants.

No. 96-CV-457-K

ORDER

On August 8, 1996, the Court informed Plaintiff that this action would be dismissed for failure to state a claim unless he filed an amended complaint, asserting claims cognizable under 42 U.S.C. § 1983. 28 U.S.C. §§ 1915(e)(2)(B) (1996). Plaintiff has failed to comply with the above order.

Accordingly, this action is hereby DISMISSED without prejudice for failing to state a claim upon which relief can be granted.

IT IS SO ORDERED this 2 day of October, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS DWAYNE BARNHART,

Plaintiff,

vs.

OKLAHOMA DRIVER LICENSE, OR DEPARTMENT OF PUBLIC SAFETY,

Respondents.

No. 96-CV-219-K

ORDER

On April 3, 1996, the Clerk of Court notified Plaintiff of several deficiencies in the above captioned civil action, including Plaintiff's failure to submit an in forma pauperis motion. As of the date of this order, Plaintiff has neither submitted an in forma pauperis motion nor requested an extension of time.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED WITHOUT PREJUDICE for failure to pay the filing fee or submit a motion for leave to proceed in forma pauperis.

SO ORDERED THIS 2 day of October, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

2

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONALD KING,

Plaintiff,

vs.

OFFICER RAY, and SUPERINTENDENT HUDLEY,

Defendants.

No. 96-C-38-K

ORDER

On February 27, 1996, the Court directed Defendants to file a special report and a dispositive motion within sixty days. Defendants have failed to comply with the above order and Plaintiff has not indicated that he wishes to continue prosecution of this action

ACCORDINGLY, IT IS HEREBY ORDERED that this action is ADMINISTRATIVELY CLOSED. In the event Plaintiff wishes to continue prosecution of this action he should notify the Court by written motion within fifteen (15) days.

IT IS SO ORDERED this 3 day of October, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

10

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of Consolidated Farm Service Agency, formerly Farmers Home Administration,

Plaintiff,

v.

JAMES M. HARPER, Jr.; CHEREIE D. HARPER aka Cherie D. Harper aka Cherie Denise Harper; COUNTY TREASURER, Craig County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Craig County, Oklahoma,

Defendants.

FILED

OCT 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 0 7 1996

CIVIL ACTION NO. 95-C-1053-C

ORDER OF DISBURSAL

NOW on the 4th day of Oct, 1996, there came on for consideration the matter of disbursal of $164,000.00 received by the United States Marshal for the sale of certain property described in the Notice of Sale in this case. The Court finds that the said $164,000.00 should be disbursed as follows:

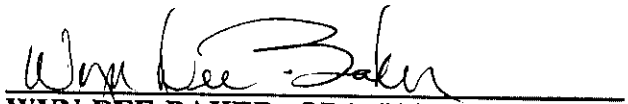
United States Marshal's Costs		$ 35.04
Mileage	$ 20.04	
Executing Order of Sale	3.00	
Advertising Sale Fee	3.00	
Conducting Sale	3.00	
Appointing Appraisers	6.00	
County Treasurer, Craig County, Oklahoma		$ 1,514.69
United States Department of Justice		$162,450.27
Appraisers' Fees	$ 225.00	
Publisher's Fee	188.08	
Recording Notice of Lis Pendens	8.00	
Credit to Judgment of FSA, fka FmHA	162,029.19	

s/H. DALE COOK

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



WYN DEE BAKER, OBA #465
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CLINT WARD, OBA #12027
Assistant District Attorney
301 West Canadian Avenue
Vinita, Oklahoma 74301
(918) 256-3320
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Craig County, Oklahoma

Order of Disbursal
Civil Action No. 95-C-1053-C (Harper)

WDB:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY J. COOPER aka Gary James Cooper; NAOMI M. COOPER aka Naomi Marie Cooper; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

OCT 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
OCT 07 1996
DATE

Civil Case No. 95-C 424C

ORDER OF DISBURSAL

NOW on the 4th day of Oct, 1996, there came on for consideration the matter of disbursal of **$12,735.00** received by the United States Marshal for the sale of certain property described in the Notice of Sale in this case. The Court finds that the said $12,735.00 should be disbursed as follows:

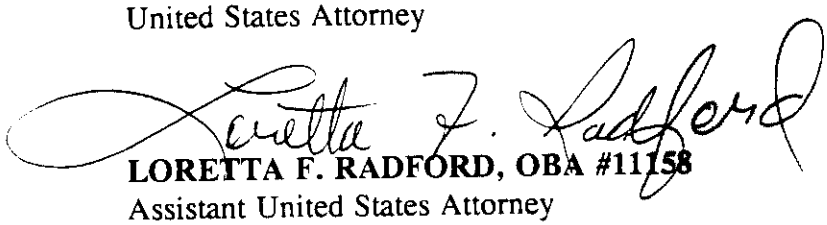
United States Marshal's Costs		$456.24
Executing Order of Sale	3.00	
Advertising Sale Fee	3.00	
Conducting Sale	3.00	
Appointing Appraisers	6.00	
Appraisers' Fees	225.00	
Publisher's Fee	172.44	
Order and Notice Setting Motion for Hearing	43.80	
United States Department of Justice Credit for Judgment of $59,634.96		$12,278.76

s/H. DALE COOK

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

LFR/flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOLLAR RENT A CAR SYSTEMS, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 95-C-691-E**
	)	
APCO ENTERPRISES, INC., a corporation and EDWARD J. PETERS, JR.,	)	
	)	
Defendants.	)	

DISMISSAL WITH PREJUDICE

Upon the Joint Application To Dismiss with Prejudice filed by the parties herein, and for good cause shown,

IT IS HEREBY ORDERED that the above-captioned matter is hereby dismissed with prejudice.

IT IS FURTHER HEREBY ORDERED that, except as otherwise provided by agreement between the parties, all parties are to bear their own costs and attorneys' fees incurred herein.

DATED this 4th day of October, 1996.

S/ JAMES O. ELLISON

The Honorable James O. Ellison
UNITED STATES DISTRICT JUDGE

KSK-1303.0

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

ELDON WADE RUTHERFORD
aka Eldon Rutherford aka Eldon W. Rutherford;
JUDY KAY RUTHERFORD
aka Judy Rutherford aka Judy K. Rutherford;
CHEMICAL BANK, as Trustee for the
GCC Home Equity Trust 1990-1;
GREENWOOD TRUST COMPANY,
a Delaware corporation;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 95-C-562-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 2 day of October, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Greenwood Trust Company, a Delaware corporation, appear by its attorney J. Michael Morgan; and the Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford; Judy Kay Rutherford aka

Judy Rutherford aka Judy K. Rutherford; and Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford, executed a Waiver of Service of Summons on July 12, 1995; that the Defendant, Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, executed a Waiver of Service of Summons on July 12, 1995; that the Defendant, Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, was served with Summons and Complaint on April 30, 1996 by a United States Deputy Marshal and also was served by certified mail, return receipt requested, delivery restricted to the addressee as shown in the Court file; and that the Defendant, Greenwood Trust Company, a Delaware corporation, executed a Waiver of Service of Summons on February 8, 1996.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on July 11, 1995; that the Defendant, Greenwood Trust Company, a Delaware corporation, filed its Answer on February 15, 1996; and that the Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford; Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford; and Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 11, 1992, Eldon W. Rutherford and Judy K. Rutherford filed their voluntary petition in bankruptcy in Chapter 7 in the United

States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-02081-W. On October 5, 1992, a Discharge of Debtor was entered releasing the debtors of all dischargeable debts. Subsequently, Case No. 92-02081-W, United States Bankruptcy Court, Northern District of Oklahoma, was closed on January 20, 1993.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twenty-two (22), Block Twelve (12), VERNDALE ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 7, 1984, Eldon Wade Rutherford and Judy Kay Rutherford executed and delivered to Realbanc, Inc., their mortgage note in the amount of $43,350.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Eldon Wade Rutherford and Judy Kay Rutherford, husband and wife, executed and delivered to Realbanc, Inc., a real estate mortgage dated March 7, 1984, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on March 8, 1984, in Book 4772, Page 1852, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirsTier Mortgage Co., formerly known as Realbanc, Inc., assigned the above-described mortgage note and mortgage to

Leader Federal Savings & Loan Association. This Assignment of Mortgage/Deed of Trust was recorded on September 19, 1988, in Book 5128, Page 2993, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 9, 1992, Leader Federal Bank for Savings fka Leader Federal Savings & Loan Association assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Real Estate Mortgage was recorded on March 26, 1992, in Book 5391, Page 1751, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 10, 1992, Eldon W. Rutherford and Judy K. Rutherford executed and delivered to the United States of America, on behalf of the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due was made principal and the interest rate was changed to 8 percent.

The Court further finds that the Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, made default under the terms of the aforesaid note, mortgage and modification and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, are indebted to the Plaintiff in the principal sum of $46,305.54, plus administrative charges in the amount of $425.00, plus accrued interest in the amount of $5,788.30 as of March 21, 1995, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest

thereafter at the legal rate until fully paid, and the costs of this action in the amount of $263.00 ($8.00 fee for recording Notice of Lis Pendens; $155.00 fee for abstracting; $100.00 fee for evidentiary affidavit).

The Court further finds that the Defendant, Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, is in default and therefore has no right, title or interest in the subject real property.

The Court further finds that the Defendant, Greenwood Trust Company, a Delaware corporation, has a lien on the property which is the subject matter of this action by virtue of a judgment lien in the principal amount of $2,076.84, with interest, filed of record with the County Clerk of Tulsa County on June 17, 1992.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendants, **Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford,** in the principal sum of $46,305.54, plus administrative charges in the amount of $425.00, plus accrued interest in the amount of $5,788.30 as of March 21, 1995, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.90 percent per annum until paid, plus the costs of this action in the amount of $263.00 ($8.00 fee for

recording Notice of Lis Pendens; $155.00 fee for abstracting; $100.00 fee for evidentiary affidavit), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Greenwood Trust Company, a Delaware corporation**, have and recover judgment in the principal amount of **$2,076.84**, with interest, by virtue of a judgment lien filed of record with the County Clerk of Tulsa County on June 17, 1992.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

> First:
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Plaintiff;

Third:
In payment the judgment rendered herein in favor of the Defendant, Greenwood Trust Company, a Delaware corporation.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

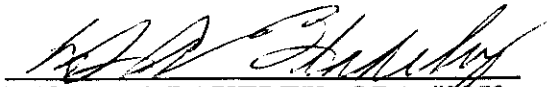
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #0852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4835
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

J. MICHAEL MORGAN, OBA #6391
7030 South Yale, Suite 309
Tulsa, Oklahoma 74136-5712
(918) 492-4172
Attorney for Defendant,
Greenwood Trust Company, a Delaware corporation

Judgment of Foreclosure
Case No. 95-C-562-K (Rutherford)

CDM:css

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT - 3 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

FERN FRIEND, et al,

Plaintiffs,

vs.

ARROWHEAD STATOR & ROTOR, INC., et al,

Defendants.

Case No. 95-C-774-B

ENTERED ON DOCKET
DATE OCT 04 1996

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by November 29, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 3rd day of October, 1996.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

(81)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs,	)	ENTERED ON DOCKET DATE OCT 04 1996
Plaintiff,	)	
v.	)	
ELDON WADE RUTHERFORD aka Eldon Rutherford aka Eldon W. Rutherford; JUDY KAY RUTHERFORD aka Judy Rutherford aka Judy K. Rutherford; CHEMICAL BANK, as Trustee for the GCC Home Equity Trust 1990-1; GREENWOOD TRUST COMPANY, a Delaware corporation; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	**FILED** OCT 03 1996 Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	CIVIL ACTION NO. 95-C-562-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 2 day of October, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Greenwood Trust Company, a Delaware corporation, appear by its attorney J. Michael Morgan; and the Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford; Judy Kay Rutherford aka

NOTE: THIS ORDER IS SENT BY MAIL TO PRO SE LITIGANTS UPON RECEIPT.

Judy Rutherford aka Judy K. Rutherford; and Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford, executed a Waiver of Service of Summons on July 12, 1995; that the Defendant, Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, executed a Waiver of Service of Summons on July 12, 1995; that the Defendant, Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, was served with Summons and Complaint on April 30, 1996 by a United States Deputy Marshal and also was served by certified mail, return receipt requested, delivery restricted to the addressee as shown in the Court file; and that the Defendant, Greenwood Trust Company, a Delaware corporation, executed a Waiver of Service of Summons on February 8, 1996.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on July 11, 1995; that the Defendant, Greenwood Trust Company, a Delaware corporation, filed its Answer on February 15, 1996; and that the Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford; Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford; and Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 11, 1992, Eldon W. Rutherford and Judy K. Rutherford filed their voluntary petition in bankruptcy in Chapter 7 in the United

States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-02081-W. On October 5, 1992, a Discharge of Debtor was entered releasing the debtors of all dischargeable debts. Subsequently, Case No. 92-02081-W, United States Bankruptcy Court, Northern District of Oklahoma, was closed on January 20, 1993.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twenty-two (22), Block Twelve (12), VERNDALE ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 7, 1984, Eldon Wade Rutherford and Judy Kay Rutherford executed and delivered to Realbanc, Inc., their mortgage note in the amount of $43,350.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Eldon Wade Rutherford and Judy Kay Rutherford, husband and wife, executed and delivered to Realbanc, Inc., a real estate mortgage dated March 7, 1984, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on March 8, 1984, in Book 4772, Page 1852, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirsTier Mortgage Co., formerly known as Realbanc, Inc., assigned the above-described mortgage note and mortgage to

Leader Federal Savings & Loan Association. This Assignment of Mortgage/Deed of Trust was recorded on September 19, 1988, in Book 5128, Page 2993, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 9, 1992, Leader Federal Bank for Savings fka Leader Federal Savings & Loan Association assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Real Estate Mortgage was recorded on March 26, 1992, in Book 5391, Page 1751, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 10, 1992, Eldon W. Rutherford and Judy K. Rutherford executed and delivered to the United States of America, on behalf of the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due was made principal and the interest rate was changed to 8 percent.

The Court further finds that the Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, made default under the terms of the aforesaid note, mortgage and modification and reamortization agreement by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, are indebted to the Plaintiff in the principal sum of $46,305.54, plus administrative charges in the amount of $425.00, plus accrued interest in the amount of $5,788.30 as of March 21, 1995, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest

thereafter at the legal rate until fully paid, and the costs of this action in the amount of $263.00 ($8.00 fee for recording Notice of Lis Pendens; $155.00 fee for abstracting; $100.00 fee for evidentiary affidavit).

The Court further finds that the Defendant, Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, is in default and therefore has no right, title or interest in the subject real property.

The Court further finds that the Defendant, Greenwood Trust Company, a Delaware corporation, has a lien on the property which is the subject matter of this action by virtue of a judgment lien in the principal amount of $2,076.84, with interest, filed of record with the County Clerk of Tulsa County on June 17, 1992.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendants, **Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford,** in the principal sum of $46,305.54, plus administrative charges in the amount of $425.00, plus accrued interest in the amount of $5,788.30 as of March 21, 1995, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.90 percent per annum until paid, plus the costs of this action in the amount of $263.00 ($8.00 fee for

recording Notice of Lis Pendens; $155.00 fee for abstracting; $100.00 fee for evidentiary affidavit), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Greenwood Trust Company, a Delaware corporation**, have and recover judgment in the principal amount of **$2,076.84**, with interest, by virtue of a judgment lien filed of record with the County Clerk of Tulsa County on June 17, 1992.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Eldon Wade Rutherford aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

> First:
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Plaintiff;

Third:
In payment the judgment rendered herein in favor of the Defendant, Greenwood Trust Company, a Delaware corporation.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

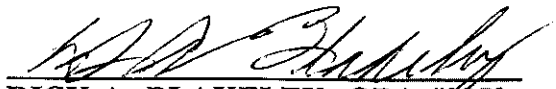
S/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #0852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4835
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

J. MICHAEL MORGAN, OBA #6391
7030 South Yale, Suite 309
Tulsa, Oklahoma 74136-5712
(918) 492-4172
Attorney for Defendant,
Greenwood Trust Company, a Delaware corporation

Judgment of Foreclosure
Case No. 95-C-562-K (Rutherford)

CDM:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM JORDAN,

Plaintiff,

vs.

LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

No. 96-C-33-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 2 day of October, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

13

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TONY EUGENE CATO,

Petitioner,

vs.

H.N. SCOTT,

Respondent.

No. 96-CV-484-K

ORDER

This matter comes before the Court on Respondent's motion to dismiss this habeas corpus action for failure to exhaust state remedies, filed on August 23, 1996. (Doc. #5.) Petitioner, a pro se litigant, has not responded.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has not exhausted all the various grounds for relief he has alleged.

9

Moreover, Petitioner's failure to object to Respondent's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

Accordingly, Respondent's motion to dismiss (docket #5) is granted and the petition for a writ of habeas corpus is hereby dismissed without prejudice for failure to exhaust state remedies.

IT IS SO ORDERED this 2 day of October, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOCKET

OCT 0 4 1996

MARVIN R. WASHINGTON,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

No. 96-CV-319-K

FILED

OCT 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On April 25, 1996, the Clerk of Court notified Plaintiff of several deficiencies in the above captioned civil action, including Plaintiff's failure to submit an in forma pauperis motion. As of the date of this order, Plaintiff has neither submitted an in forma pauperis motion nor requested an extension of time.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED WITHOUT PREJUDICE for failure to pay the filing fee or submit a motion for leave to proceed in forma pauperis.

SO ORDERED THIS 2 day of October, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS HUNTER,

Plaintiff,

vs.

TULSA COUNTY DISTRICT COURT,

Defendants.

No. 96-CV-743-K

ORDER

On August 27, 1996, the Clerk of Court notified Petitioner that he needed to submit a motion for leave to proceed in forma pauperis. On September 4, 1996, the Clerk's letter was returned by the Post Office with the notation "return to sender."

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED WITHOUT PREJUDICE for lack of prosecution and for failure to pay the filing fee.

SO ORDERED THIS 2 day of October, 1996.

Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TEXACO REFINING and MARKETING INC., Plaintiff,	)	
vs.	)	Case No. 96-CV-163E
AYMAN ALZAIM, Defendant.	)	

ENTERED ON DOCKET
DATE OCT 04 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff , Texaco Refining and Marketing Inc., and Defendant, Ayman Alzaim, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of all claims in the Complaint and Counterclaim with prejudice.

The parties are to bear their own attorney's fees and costs.

DATED: October 3rd, 1996.

By: _____
Ronald N. Ricketts, OBA No. 7563
Gable Gotwals Mock Schwabe
2000 Boatmen's Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201

ATTORNEY FOR PLAINTIFF

By: _____
Timothy M. McCormick, OBA No. 5920
McCormick, Schoenenberger & Davis, P.A.
1516 South Boston, Suite 320
Tulsa, Oklahoma 74119-4019
(918) 582-3655

ATTORNEY FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DIANE L. JONES aka Diane Luzette Jones; GENE JONES, JR. aka Gene Jones; FIDELITY FINANCIAL SERVICES, INC; STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95 C 768BU

AMENDED JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 2nd day of Oct, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, DIANE L. JONES aka Diane Luzette Jones, appears by her Attorney, Gary W. Wood; the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, appears by Sheila Condren, OBA #44; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, GENE JONES, JR., aka Gene Jones and FIDELITY FINANCIAL SERVICES, INC., appear not, but make default.

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

The Court being fully advised and having examined the court file finds that the Defendant, FIDELITY FINANCIAL SERVICES, INC, signed a Waiver of Summons on August 11, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, acknowledged receipt of Summons and Complaint on August 11, 1995, by Certified Mail.

The Court further finds that the Defendant, GENE JONES, JR., aka Gene Jones, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning January 24, 1996, and continuing through February 28, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, GENE JONES, JR., aka Gene Jones, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, GENE JONES, JR., aka Gene Jones. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully

exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on September 5, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, filed its Answer on October 10, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on October 23, 1995; that the Defendant, DIANE L. JONES aka Diane Luzette Jones, filed her Answer on September 25, 1995; and that the Defendants, GENE JONES, JR., aka Gene Jones and FIDELITY FINANCIAL SERVICES, INC, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DIANE L. JONES, is one and the same person as Diane Luzette Jones, and will hereinafter be referred to as "DIANE L. JONES." The Defendant, GENE JONES, JR., is one and the same person as Gene Jones, and will hereinafter be referred to as "GENE JONES, JR." The Defendants, DIANE L. JONES and GENE JONES, JR., were granted a Divorce on November 28, 1988, in Case No. FD-88-1406, in Tulsa County, Oklahoma. The Defendants, DIANE L. JONES and GENE JONES, JR., are both single unmarried persons.

The Court further finds that on November 9, 1988, Gene Jones, Jr., filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern

District of Oklahoma, Case No. 88-B-3458 C. On March 3, 1989, the Discharge of Debtor was filed and on April 24, 1989, the case was subsequently closed. On June 18, 1990, Diane Luzette Jones, filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-B-1661 C. On October 10, 1990 the Discharge of Debtor was filed and on December 10, 1990, the case was subsequently closed.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Twenty-five (25), Block Forty-eight (48), VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on November 29, 1979, the Defendants, GENE JONES, JR., and DIANE L. JONES, executed and delivered to MIDLAND MORTGAGE CO., their mortgage note in the amount of $20,900.00, payable in monthly installments, with interest thereon at the rate of Eleven and One-Half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, GENE JONES, JR., and DIANE L. JONES, husband and wife, executed and delivered to MIDLAND MORTGAGE CO., a mortgage dated November 29, 1979, covering the above-described property. Said mortgage was recorded on December 4, 1979, in Book 4444, Page 1664, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 28, 1988, MIDLAND MORTGAGE CO., assigned the above-described mortgage note and mortgage to MIDFIRST SAVINGS & LOAN

ASSOCIATION. This Assignment of Mortgage was recorded on May 3, 1988, in Book 5096, Page 2255, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 7, 1989, MIDFIRST SAVINGS AND LOAN ASSOCIATION, assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington D.C., his successors and assigns. This Assignment of Mortgage was recorded on March 9, 1989, in Book 5170, Page 2277, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1989, the Defendant, DIANE L. JONES, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements w reached between these same parties on February 22, 1990, April 2, 1990 and April 17, 1991.

The Court further finds that the Defendants, GENE JONES, JR., and DIANE L. JONES, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, GENE JONES, JR., and DIANE L. JONES, are indebted to the Plaintiff in the principal sum of $38,495.80, plus interest at the rate of 11.50 percent per annum from March 20, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $2.00 which became a lien on the property

as of July 2, 1990, a lien in the amount of $1.00 which became a lien on the property as of June 20, 1991, a lien in the amount of $18.00 which became a lien on the property as of June 26, 1992 and a lien in the amount of $8.00 which became a lien on the property as of June 25, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $643.00 which became a lien on the property as of May 14, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $143.87 which became a lien on the property as of October 29, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, GENE JONES, JR., and FIDELITY FINANCIAL SERVICES, INC., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, GENE JONES, JR., and DIANE L. JONES, in the principal sum of $38,495.80, plus interest at the rate of 11.50 percent per annum from March 20, 1995 until judgment, plus interest thereafter at the current legal rate of 5.90 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $29.00, plus costs and interest, for personal property taxes for the years 1989-1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have and recover judgment in the amount of $643.00 for its judgment, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $143.87, plus accrued and accruing interest, for state income taxes, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, GENE JONES, JR., FIDELITY FINANCIAL SERVICES, INC., and DIANE L.

JONES and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, GENE JONES, JR., and DIANE L. JONES, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $2.00, for personal taxes which are currently due and owing.

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, in the amount of $643.00, for its judgment.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $19.00, for personal property taxes which are currently due and owing.

Sixth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $143.87, plus accrued and accruing interest, for state income taxes which are currently due and owing.

Seventh:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $8.00, for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

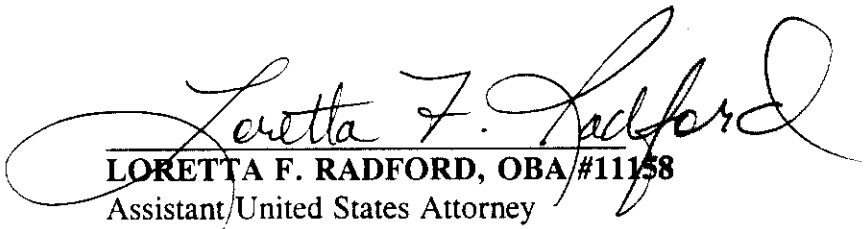
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and

decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

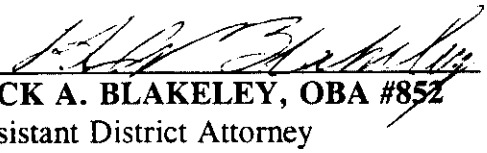
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

SHEILA CONDREN, OBA FIRM #44
Department of Human Services
Tulsa District Child Support
P.O. Box 3643
Tulsa, OK 74101
(918) 581-2203
Attorney for Defendant,
State of Oklahoma, ex rel.
Department of Human Services

KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

GARY W. WOOD, OBA #9843
3223 E. 31st Street, Ste 100
Tulsa, OK 74105
(918) 744-6119
Attorney for Defendant,
Diane L. Jones

Judgment of Foreclosure
Civil Action No. 95 C 768BU

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD J. MACHIELSON aka Richard M. Machielson; WANDA M. MACHIELSON aka Wanda Machielson; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

OCT 2 - 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 0 3 1996

Civil Case No. 96CV 591BU

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

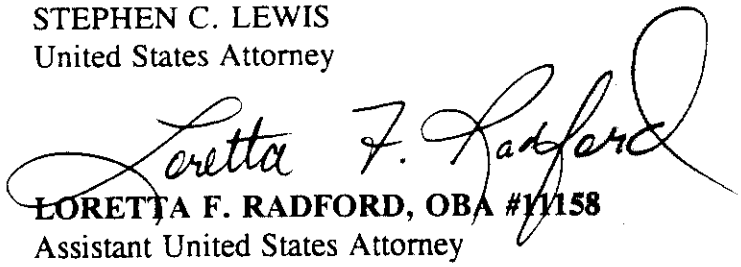
Dated this 2nd day of October, 1996.

s/ MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

NOTE: [illegible] AND PROCESSED IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

FILED

OCT 1 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA BARBEE,

Plaintiff,

vs.

CITY OF CATOOSA, a municipality, and ROGER BERRY,

Defendants.

Case No. 96-C-0022-H

ENTERED ON DOCKET
DATE 10-3-96

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, City of Catoosa and Rodger Berry, are hereby dismissed with prejudice.

Barbara Barbee
BARBARA BARBEE, PLAINTIFF

FRASIER, FRASIER & HICKMAN

By: Karen Goins
KAREN GOINS, OBA #13188
1700 Southwest Boulevard
P.O. Box 799
Tulsa, Oklahoma 74101

Attorneys for Plaintiff

ELLER AND DETRICH
A Professional Corporation

By: _____
JOHN H. LIEBER, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

Attorneys for Defendant
Rodger Berry

RONALD D. WOOD AND ASSOCIATES

By: _____
RONALD D. WOOD, OBA #9848
2727 E. 21st Street, Ste. 500
Tulsa, Oklahoma 74114
(918) 744-1213

Attorneys for Defendant,
City of Catoosa

3.MAG\Barbee\Stipulat.Dis

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

RON RANDOLPH, as parent and next friend of his minor daughter, AMANDA M. (MIMI) RANDOLPH; COY E. & CANDACE L. BROWN, as parents and next friend of their minor daughter, HAYLEY E. BROWN; ROBERT C. & SUSAN J. PARKER, as parents and next friend of their minor daughter, SARAH J. PARKER; ROBERT C. & SUSAN J. PARKER, as parents and next friend of their minor daughter, REBEKAH S. PARKER; ROBERT F. & VICKI L. RANDOLPH, JR., as parents and next friend of their minor daughter, TERI JO RANDOLPH; JIM & KAY PIGG, as parents and next friend of their minor daughter, MELISA PIGG; TOM & BECKY MARTIN, as parents and next friend of their minor daughter, SHERA MAE MARTIN; and on behalf of all others similarly situated,

Plaintiffs,

v.

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; RICK DOSSETT, individually and in his official capacity as Principal; JOHN SCOTT, individually and in his official capacity as Athletic Director; and Does 1 through 50,

Defendants.

CONSENT DECREE

Case No. 96-CV-0105K

CLASS ACTION

CONSENT DECREE

This Consent Decree is entered by the Court based upon an agreement between the above captioned Plaintiffs individually and in their capacity as representatives of a class of individuals described as, "[A]ll present and future female students enrolled at Owasso Public Schools who participate, seek to participate, or are deterred from participating in interscholastic and other school-sponsored athletics at Owasso Public Schools" ("the Class") and Defendants Owasso Independent School District No. I-011 ("Owasso" or "District"), Dale Johnson, Rick Dossett and John Scott. No John Doe defendants were named during the course of the litigation and no additional defendants will be named as parties to this case.

This Consent Decree settles each of the claims stated in the Complaint in the captioned case alleging gender discrimination and also resolves all claims asserted against individuals who were named in their official and individual capacities. With the Court's approval of this Consent Decree, and upon Defendants' compliance with its terms, all claims in this action will be dismissed with prejudice. The term Claims as used in this Consent Decree means all claims asserted in the complaint or all claims which could have been asserted through the date of this Consent Decree.

I. PRELIMINARY STATEMENT

The parties have jointly agreed, through their designated representatives, that the interests of the District's students (male and female) are best served by reaching

agreement regarding the manner in which the District will comply with Title IX. The parties concur that increasing participation options, combined with affording equal treatment and benefits to female students, is essential to Title IX compliance. This can best be achieved by a cooperative effort joining Title IX's mandatory requirements with the parties' genuine dedication to designing an athletic program that enhances the benefits of athletic involvement for female students.

The parties believe that through the reaffirmation of the mandatory requirements of Title IX, implementation of a plan for achieving compliance with Title IX's requirements related to athletic programs, and adoption of a procedure for encouraging the expression of comments or grievances involving questions relating to the District's athletic programs, the parties will achieve a model Title IX compliance plan.

Accordingly, the parties have approved this Consent Decree with the purpose of desiring to stimulate and accommodate the interest and participation of female students in athletics. It is hoped that the actions, to which the parties jointly agree, will lead other public schools to review their sports programs with the goal of providing increased opportunities for female participation in sports combined with treatment and benefits that are not differentiated in practice or philosophy on the basis of gender.

This Consent Decree applies to the members of the Class as described in the opening paragraph of this Decree.

II. GENERAL PRINCIPLES

Owasso agrees to comply with the general mandates of Title IX, its Regulations, and its Interpretive Guidance.[1] Title IX prohibits gender-based discrimination by educational institutions receiving federal financial support. Special attention is afforded the area of participation opportunities and accommodation of athletic interests. Female students must have ample opportunities to participate in sports. Furthermore, the interests of female students must be effectively accommodated. Accommodation of interests may be accomplished through the installation of new sports or through the addition of appropriate levels of teams in connection with existing sports.

A second prong of Title IX mandates equality in treatment and benefits afforded to female and male students who participate in sports. The District's obligation is to be responsive to the expressed interest of female students in the District and to avoid discrimination against female students in treatment and the provision of benefits.

The District is not required to have or maintain an athletic program. However, when it does maintain such a program, the program must be gender neutral. Treatment and benefits for secondary public schools, as distinguished from colleges and universities, involve the following program components:

1. Funding of interscholastic and other school-sponsored sports programs;

2. Equipment and supplies;

---

[1] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et. seq. (1988); OCR Regulations "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance." 34 C.F.R. §106 (1994); and Related Policy Guidance.

3. Uniforms;

4. Scheduling of games and practice times;

5. Opportunity to receive competent coaching and the assignment and compensation of coaches;

6. Provision of locker rooms, practice facilities, and competitive facilities;

7. Provision of medical and training facilities and services;

8. Provision of publicity;

9. Provision of support services.

The above is a brief review of Title IX as it relates to public school athletic programs. It is not intended to be comprehensive or dispositive of schools' obligations or individual rights or responsibilities. It is, however, the statutory and decisional framework upon which this Consent Decree has been considered and reached.

In some areas the parties have agreed to actions which are designed to provide information which will guide future decisions related to female student participation opportunities. In other areas the parties have agreed that particular practices should be immediately altered in order to assure compliance with Title IX and its Regulations.

Accordingly, the District agrees to take specific actions to insure that the mandates of Title IX are met. The District also agrees to institute a periodic survey of student interest to insure that female student participation interest and opportunities are identified and, when appropriate, responded to. The District agrees that its discrimination grievance procedure, as amended, shall be available to students and employees who believe that

Title IX's requirements related to public school athletic programs have not been adhered to.

A. PARTICIPATION

1. Owasso shall conduct a student interest survey during the last quarter of the school year, as further set out below, for the purpose of ascertaining the level of interest in existing sports or in sports which are not currently offered by the District. The student interest survey shall be conducted during the 1996-97 and 1997-98 school years and every other year thereafter. The District shall consider the results of the survey, along with the opportunity for competition which realistically exists, in determining whether to add female teams to existing sports, add new female interscholastic sports, or add female intramural sports. When interscholastic competition is available and warranted by the numbers of students participating in a sport, the District shall make reasonable effort to insure that the maximum number of competitive opportunities are available to female participants. When the maximum available games are not played, the coach shall document any reason(s) for not completing a full schedule of competition opportunities.

2. Owasso currently sponsors a varsity and junior varsity female softball team. It shall consider the addition of a freshman team in future years. The establishment of interscholastic and other school-sponsored teams shall be based on the level of demonstrated interest in softball, on the results of the student interest survey, and on related factors, as expressed herein, that show interest in sports participation.

3. The reference in this consent decree to "intramural" opportunities refers to the provision of intraschool competitive sports opportunities based on student interest in the areas of softball, volleyball, and tennis. The District may consider, in establishing intramural opportunities, the availability of coaches, facilities and volunteers. Owasso shall initiate its intramural plan effective with the 1997-98 school year. It shall make reasonable effort to have some intramural opportunities available for middle school (7th and 8th grade) students in the Spring of 1997. Both parties acknowledge that the District's intramural opportunities do not require the District to provide softball fields, volleyball courts or other arenas of competition which are the same as or equal to those provided in connection with interscholastic sports. Similarly, the District is not required to utilize paid coaches to staff its intramural program. Intramural activities shall be scheduled seasonally during each school year. Intramural sports activities, involving the middle school, may be discontinued, as to any sport, at such time as the District provides interscholastic competition.

4. Owasso has previously initiated plans to include volleyball as a new sport available to female students at the secondary level (grades 9-12). The sport shall begin with the 1996-97 school year and the District shall sponsor a varsity and junior varsity team. During the 1996-97 school year the District will consider the active interest in volleyball as revealed by the number of students who try out for volleyball and who actively participate during the season, the level of community support for volleyball as evidenced by volleyball activity in the surrounding community, the responses received

from female students as documented by the student interest survey, the comments of coaches and similar information in determining whether to add additional teams in volleyball and whether to extend volleyball to the middle school level for the 1997-98 school year.

5. In connection with any interscholastic sport offered to females, if a sufficient number of females are "cut" from any existing team, Owasso shall make a good faith effort to establish a new team at the appropriate level of athletic performance, in order to accommodate the participation interest of cut players. Owasso shall make a good faith effort to provide a meaningful competitive schedule or other competitive outlet for females who have shown interest in participation but who have been "cut" from a team. For example, Owasso may provide intramural opportunities, as described in paragraph 3 above, to meet these obligations. The term "cut" as used in this Consent Decree means that a female student is removed from a team roster by the team's coach due to perceived lack of skill of the student as compared to other members of the team.

6. Owasso shall make reasonable effort to expand participation opportunities for female students at the middle school level. Owasso's middle school consists of 7th and 8th grade students. This effort shall involve a study conducted during the 1996-97 school year to ascertain the opportunities for sports participation available to girls as compared with boys. The District shall establish a plan, effective for the 1997-98 school year, that will, at the middle school level, provide equal opportunity for girls who desire to participate in school-sponsored sports. This shall take into consideration the reasonable

interscholastic competitive opportunities available at the middle school level and intramural opportunities as provided for in this Consent Decree. The District's plan may, at its option, provide for the elimination of school-sponsored middle school sports.

7. Owasso shall review all of its policies related to athletic participation or participation in extracurricular activities which may impact the opportunity of a female student to participate in a sport or to participate in more than one sport. Policies shall be adopted to encourage and not discourage girls' sports participation at all levels. Whenever possible and feasible within the school schedule and the underlying requirements of an activity (whether athletic or non-athletic) reasonable effort shall be made to permit female students an opportunity to participate in one or more athletic activities and also participate in nonathletic activities. For example, cheerleader or pompon participants should not be excluded from participating in interscholastic or intramural sports by policies or practices which would require them to select one activity over the other for the entire academic year.

B. TREATMENT AND BENEFITS

1. Owasso places all revenue generated from its interscholastic sports programs into a central fund. The District shall continue this practice and revenue from all sources will be subject to the School District's normal accounting requirements. This includes gate receipts, concessions, advertising revenue, donations from boosters (in cash and in-kind) and any other revenue applied to Owasso's interscholastic and other school-sponsored athletic programs. The District shall maintain a written budget applicable to its

anticipated expenditures which details all revenue and expenses in connection with inter-scholastic and other school-sponsored sports. Owasso shall fund its interscholastic and other school-sponsored sports programs in a manner which does not discriminate against female athletes.

2. Owasso shall provide female athletes with comparable equipment and supplies (in terms of both quality and quantity) as provided male athletes and as are appropriate to the particular sport.

3. Owasso shall provide female athletes with comparable uniforms (in terms of both quality and quantity) as provided male athletes and as is appropriate to the particular sport.

4. Owasso has taken affirmative steps to eliminate any disparities relating to the scheduling of games and practice times. Sixth hour credit, when sixth hour credit exists, shall be offered equally to female and male sports participants. Sixth hour athletics can be addressed by Owasso in the following ways: Owasso's decision not to provide sixth hour athletics related to any school-sponsored sports, an offer of sixth hour athletics to all student athletes who desire to enroll in sixth hour athletics, or rotation of sixth hour athletics in a manner that equally distributes opportunity to enroll in sixth hour athletics to all student athletes. In any event, by the beginning of the 1997-98 school year the District shall implement a procedure that shall insure that girls have equal access to sixth hour athletics. Basketball games shall be scheduled in a manner which provides males and females an equal opportunity to play at the most desirable game times. This may be

accomplished, at the District's option, by alternating game times from one game night to the other or by alternating schedules from one year to the next to provide females with an opportunity to play games at the hour historically reserved to males' basketball teams. Likewise, soccer games shall also be scheduled in a manner which extends to females an opportunity to play the same number of games at the time considered the most desirable game time. Softball games may be scheduled even if they conflict with football games.

5. Female athletes shall be treated in the same manner as male athletes with respect to travel privileges and travel support. This means that females who have opportunities to participate in out-of-state tournaments shall be given the same consideration as males who have that opportunity. Likewise, both groups shall be treated in the same manner as to travel arrangements, housing, and meals. When females are presented with opportunities for out-of-state or overnight travel, the arrangements for travel shall be the same as those available to males in connection with the same or similar sports.

6. Owasso shall make reasonable effort to insure that coaches are selected for female athletic teams in the same manner as they are selected for male athletic teams. The District shall adhere to relevant negotiated collective bargaining agreements related to the selection of personnel, shall advertise for coaches, and shall insure that salary applicable to coaching duties is gender neutral. The District shall make reasonable effort to advertise the position and seek the best qualified individual for the position when selecting a coach for female team sports as the District uses in selecting a coach for male

team sports. Owasso shall allow utilization of volunteer coaches in the same manner for female team sports as for male team sports.

7. Owasso shall provide comparable athletic facilities for male and female athletes based on the sports offered, taking into consideration the nature and needs of the particular sport and the District's need to engage in long-term planning related to construction of new facilities or major renovation of existing facilities.

8. In regard to softball, for the 1996-97 school year, Owasso shall insure that the lights at the City Park are in working order, shall add portable bleachers, shall insure that a portable concession trailer is available for scheduled games, shall ensure that sanitary restrooms are maintained, and shall ensure the field is maintained and regularly mowed. This shall continue for as long as the City Park is used by the Owasso girls' softball teams.

9. Owasso shall construct an on-campus softball field which is comparable in quality to the existing baseball field. The on-campus softball field shall be made competition-ready, if possible, by August 1, 1997. The total commitment to a softball field shall be phased in over a three-year period or longer dependent upon the availability of revenues as discussed in paragraph 10 below. Phase I shall be completed by August 1, 1997, and shall include: dirt work, grade work, fences, infield dirt, sprinkler system, outfield grass, scoreboard (moved from prior location), temporary covered dugouts, portable bleachers, portable restrooms, and a portable concession trailer. If financially feasible lighting will be included in Phase I and, in any event, a priority in Phase II.

Phase II shall be completed on or before August 1, 1998, and shall include dugouts, pressbox, public address system, parking, flag pole and lighting (if not already completed). Phase III shall be completed on or before August 1, 1999, and shall include a permanent concession and restroom facility. Owasso shall not construct a softball/baseball work-out facility until such time as it has completed the softball field provided for within this Consent Decree.

10. Owasso is a public school district. In order to obtain money to construct a softball field, and related facilities, it must pass a bond issue and access funds available through its building fund. Accordingly, the District shall commit to placing before eligible voters a spring 1997 bond issue which shall include a proposition for a softball field. Additionally, the District shall commit, for the school year 1996-97, Seventy-five Thousand Dollars ($75,000) from its building fund toward the construction of a softball field to be located on the high school campus. The District shall continue to present bond issues, when feasible, to its voters until such time as all phases of the softball field are complete. The District is dependent, absent an infusion of funds from outside the school district, on its ability to pass bond issues in order to fund the construction of a softball field. If funds are not available to complete the softball field, due to voters' failure to pass one or more bond issues proposing the construction of the softball field, in accordance with the phases for construction laid out in paragraph 9 above, the District shall, notwithstanding failure of a bond issue, commit a minimum of $75,000 per year from the District's building fund until all phases are completed.

11. Softball parents and students are committed to raising, through their own fund raising activities, monies to be dedicated to the completion of the softball field. Accordingly, Owasso shall match up to $5,000 of funds privately raised by softball parents and students during each year of construction of the softball field. Moreover, if more than $5,000 is privately raised in any year Owasso shall seriously consider matching such additional amount, taking into account budgetary constraints. These funds shall be utilized exclusively for the construction of the softball field as described in paragraph 9 above.

12. During the period prior to completion of the softball field, Owasso shall continue to make available the use of the City Park to the softball team.

13. Owasso shall provide equal access to weight training and conditioning facilities and equipment to female athletes and male athletes. Owasso shall also provide, by the end of the 1996-97 fiscal school year, to be effective at the beginning of the 1997-98 school year, a plan for achieving sports specific weight training and conditioning facilities and equipment which are designed to offer benefits to girls which are comparable to those offered by Owasso to boys.

14. Owasso shall promote and publicize female and male sports and shall encourage individual female team coaches to utilize available opportunities to publicize female sports involvement and accomplishment. This means that Owasso shall give equivalent attention to the female teams in connection with school announcements, advertisements, assemblies, signage, school publications (such as the paper, yearbook,

letters to parents), pep rallies, and other opportunities to publicize female involvement in sports.

C. OTHER PROVISIONS -- TITLE IX COMPLIANCE OFFICER POSITION

Owasso has an employee of the District who is designated as its Title IX Compliance Officer. The Compliance Officer shall be responsible for ensuring the District's compliance with Title IX, the Regulations, and the Policy Interpretations. The Compliance Officer shall also have specific duties. The specific duties shall include the periodic survey of student interest in sports participation. The survey and the compilation of results shall be made available to any person for inspection within five (5) business days after a written request for the same. A copy of the survey and results shall be made available for any person who pays the District its normal and customary copy expense.

The Compliance Officer shall compile and retain for inspection financial data about Owasso's interscholastic and other school-sponsored sports programs which details all revenues produced sport-by-sport and expenditures made in connection with each sport. This financial accounting shall include revenues as previously defined in B.1. The financial accounting shall include expenditures pertaining to equipment, coaching, travel, supplies, facilities and any other factors listed in 34 C.F.R. § 106.41(c). The data shall be compiled annually and shall be available for inspection following the end of each school fiscal year, within five (5) business days after a request for the same. A copy of the data shall be made for any person who pays the District its normal and customary copy expense.

The Compliance Officer shall schedule annual educational seminars for Owasso teachers and administrators which explain the mandates of Title IX herein described. The seminar for employees shall occur during the first quarter of each year. Additionally, the Compliance Officer shall be responsible for insuring, on an annual basis, that interested parents or guardians are provided an opportunity to understand the application of Title IX to the District's athletics program. This may be accomplished through mailings, seminars or in other ways calculated to educate interested parents or guardians regarding the District's programs and legal mandates in this area.

The Compliance Officer shall coordinate student education regarding Title IX and its relationship to student participation in sports through the school's physical education classes. This instruction shall be provided no less than annually.

The Compliance Officer shall prepare an amended grievance procedure which shall be based on Owasso's "Grievance Procedures For Filing, Processing And Resolving Alleged Discrimination Complaints." This grievance procedure shall provide a mechanism for a grievance hearing for a parent or student who believes he or she is aggrieved by Owasso's alleged failure to comply with the mandates of Title IX, the Regulations, the Policy Interpretations, or the terms of this Consent Decree. The procedure shall be amended to provide for an initial hearing before either the Principal or the Superintendent, and a right of appeal to the Board of Education. The lapse of time from the date of filing of the written grievance with the Compliance Officer to the date of final decision by the Board of Education shall not exceed seventy (70) calendar days.

The Compliance Officer shall insure distribution of the District's amended grievance procedure to District employees, parents and students in a manner designed to achieve widespread publication. A summary of the Consent Decree shall be published in "News to You," which is a regular publication of the Owasso School District.

The parties to this Decree concur that it is not the purpose of this agreement to impose any obligation not imposed by Title IX's provisions related to athletic programs. Accordingly, this law shall provide the basis for evaluating the District's compliance with the provisions of this Decree.

III. COURT'S INVOLVEMENT

This Consent Decree is approved by and entered as an Order and Judgment of the Court and shall be subject to the full enforcement powers of the Court. All claims against individually named defendants shall be dismissed with prejudice upon the approval and entry of this Decree by the Court. In the event that a party believes that there has been a default of an obligation under this Consent Decree, such party shall take its complaint through the District's amended nondiscrimination grievance procedure as provided for in this Consent Decree. If the grievance process does not produce a mutually agreeable resolution, either party may present its claims directly to the Court and seek any relief authorized by law.

The District shall on or before August 15, 1999, submit its report to the Court and counsel for the Class showing compliance with this Consent Decree or shall clearly set

out the areas in which compliance has not been achieved. Should the District establish compliance with the Decree prior to that date, it is not prohibited from submitting its report setting forth its compliance prior to August 1999. The report shall show the District's compliance with all terms and conditions of this Consent Decree. The Court shall schedule a Hearing on Compliance and will determine if the District has complied with the terms of this Consent Decree. The Court's determination of Compliance by the District shall result in a Final Order of the Court that the District has achieved compliance and the dismissal with prejudice of this action.

IV. COSTS AND ATTORNEYS' FEES

The parties agree that the District shall pay the reasonable costs and attorneys fees incurred in connection with this lawsuit to Ray Yasser and Sam Schiller as determined by the Court or by agreement of the parties.

Entered this 2 day of ~~September,~~ October 1996.

UNITED STATES DISTRICT JUDGE
TERRY C. KERN

READ AND AGREED TO:

RON RANDOLPH

COY BROWN

CANDACE BROWN

ROBERT PARKER

SUSAN PARKER

ROBERT RANDOLPH

VICKI RANDOLPH

JIM PIGG

KAY PIGG

TOM MARTIN

BECKY MARTIN

RAY YASSER, OBA #009944
3120 E. 4th Place
Tulsa, OK 74104
(918) 631-2442
Attorneys for Plaintiffs and Class

SAMUEL J. SCHILLER, OBA #016067
Nichols, Nichols, & Kennedy
2506-A E. 21st Street
Tulsa, OK 74114
(918) 744-4407
Attorneys for Plaintiffs and Class

Of Counsel:

DEBORAH BRAKE, ESQ.
JUDITH C. APPELBAUM, ESQ.
National Women's Law Center
11 DuPont Circle, Suite 800
Washington, DC 20036
(202) 588-5180

READ AND AGREED TO:

DEFENDANT OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS

By _____
MARILYN HINKLE, President of the Board of Education of Owasso School District No. I-011, a/k/a Owasso Public Schools

_____
DALE JOHNSON, Defendant

_____
RICK DOSSETT, Defendant

_____
JOHN SCOTT, Defendant

_____
KAREN L. LONG, OBA # 5510
J. DOUGLAS MANN, OBA # 5663
ROSENSTEIN, FIST & RINGOLD
525 S. Main, Suite 700
Tulsa, OK 74103
(918) 585-9211
Attorneys for All Defendants

klI/OWA-RAN-CD0917

AFFIDAVIT OF SAMUEL J. SCHILLER AND RAY YASSER

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Samuel J. Schiller and **Ray Yasser**, of lawful age, being first duly sworn upon oath, depose and state as follows:

It is our information and belief that Coy Brown (who is the noncustodial parent of Haley Brown) is at this time unable to sign the Consent Decree in Randolph, et al. v. Owasso Public Schools, et al., United States District Court for the Northern District of Oklahoma, Case No. 96-CV-0105K. At the Court's request, we can provide more information.

DATED this 30th day of September, 1996.

FURTHER AFFIANT SAYETH NOT.

Samuel J. Schiller
SAMUEL J. SCHILLER

Ray Yasser
RAY YASSER

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Before me, a Notary Public, in and for the said County and State on this 30th day of September, 1996, personally appeared **Samuel J. Schiller**, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, under oath, for the uses and purposes therein set forth.

Witness my hand and seal the day and year last above written.

Melissa C. Taylor
NOTARY PUBLIC

My Commission Expires:
2/17/98

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Before me, a Notary Public, in and for the said County and State on this 30th day of September, 1996, personally appeared **Ray Yasser**, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, under oath, for the uses and purposes therein set forth.

Witness my hand and seal the day and year last above written.

Melissa A. Taylor
NOTARY PUBLIC

My Commission Expires:
2/17/98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHNNY C. ORR; ROSE SHARON ORR; COUNTY TREASURER, Mayes County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma,

Defendants.

Civil Case No. 95-C 1085K

ORDER

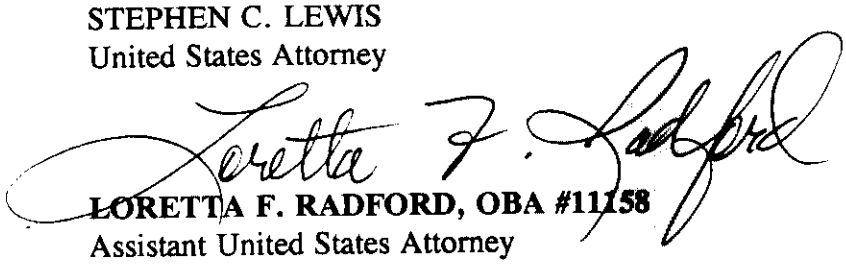
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Marshal's foreclosure sale scheduled for September 17, 1996, at 10:00 a.m., at the Tulsa County Courthouse, Tulsa, Oklahoma, is canceled, the judgment of foreclosure filed on May 23, 1996, is vacated and the action is dismissed without prejudice.

Dated this 1 day of October, 1996.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOSS EINSTEIN,

Plaintiff,

vs.

TULSA CITY-COUNTY LIBRARY SYSTEM, and JAN KEENE, Director over Central Branch Library in Downtown Tulsa

Defendants.

No. 96-C-864-K

ORDER

Now before this Court is the Application of Plaintiff, Boss Einstein, for Leave to File Action Under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) Without Payment of Fees, Costs or Security pursuant to 28 U.S.C. § 1915 (docket # 3).

Under 28 U.S.C. § 1915(d), a court, in its discretion, may dismiss a case if it is satisfied that the action is frivolous. The Court finds that the action, as filed, is frivolous because it does not state allegations under Title VII of the Civil Rights Act of 1964 for which relief can be granted. The purpose of Title VII is to prevent any person from engaging in any unlawful employment practice. Any noise or harassment occurring at the library does not constitute an unlawful employment practice under Title VII. For the reasons cited herein, Boss Einstein's Application (docket #3) is DENIED.

IT IS SO ORDERED THIS 1 DAY OF OCTOBER, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT - 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAROLD COOKSEY,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 95-CV-211-B

ENTERED ON DOCKET
DATE OCT 3 1996

ORDER

On November 21, 1995, this Court ordered the State of Oklahoma to assign new counsel to Petitioner and grant him an out-of-time appeal. On January 22, 1996, Respondent filed a Notice, informing this Court that the Oklahoma Courts had complied with the November 21, 1995 Order.

ACCORDINGLY, IT IS HEREBY ORDERED that this habeas corpus action is hereby DISMISSED WITH PREJUDICE.

SO ORDERED THIS 2nd day of Oct., 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LELAND C. BURROW and ROSEMARY BURROW, husband and wife,

Plaintiffs,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation, and DELL HUGHES, an individual,

Defendants.

Case No. 96-C-620-E

ORDER

Before the Court is Defendant Metropolitan Life Insurance Company's ("MetLife") Motion to Dismiss (Docket No. 9). On June 7, 1996, Plaintiffs Leland C. and Rosemary Burrow (the "Burrows") filed suit in the District Court of Tulsa County alleging bad faith breach of contract, fraud and deceit, breach of contract, violation of the Oklahoma and Federal Securities Acts, negligent supervision, and emotional distress. MetLife removed the action on July 8, 1996 based on the Burrows' federal securities claim. On August 9, 1996, MetLife filed a motion to dismiss plaintiffs' complaint. MetLife sought and was granted a stay of discovery pending a decision on that motion pursuant to 15 U.S.C. §78u-4(b)(3)(B). Given the stay of discovery, the motion to dismiss was set for prompt hearing.

At the September 24, 1996 hearing, the parties agreed that (1) any claim under Sections 10(b) of the Securities Exchange Act of 1934 was barred by the three year statute of repose and (2) there was no private cause of action under Section 17(a) of the Securities Act of 1933. Accordingly, the Court dismisses Burrows' federal securities claim(s). In so doing, the Court concludes that no federal question jurisdiction exists and thus remands the case, and the remaining issues raised in MetLife's

(23)

motion to dismiss, to the state court for decision.

IT IS SO ORDERED this 17th day of October 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 3 0 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERESSA GRAYSON, as Special Administratrix of the Estate of Simon Adrian Meggs, Deceased,

Plaintiff,

v.

FIRST HEALTHCARE CORPORATION, a corporation, d/b/a Heritage Manor Nursing and Convalescent Center; THE HILLHAVEN CORPORATION, a corporation, d/b/a Heritage Manor Nursing and Convalescent Center; NME PROPERTIES, INC., a corporation, formerly Hillhaven, Inc., d/b/a Heritage Manor Nursing and Convalescent Center; and ALLAN SUPAK, M.D., an individual,

Defendants.

No. 95-C-771-B

ENTERED ON DOCKET
DATE OCT 1 1996

ORDER OF DISMISSAL

This matter comes on for hearing on the Joint Stipulation of Plaintiff, Teressa Grayson, as Special Administratrix of the Estate of Simon Adrian Meggs, Deceased, by and through her attorney of record, Alan R. Carlson; the Defendants, First Healthcare Corporation, d/b/a Heritage Manor Nursing and Convalescent Center; The Hillhaven Corporation, d/b/a Heritage Manor Nursing and Convalescent Center; and NME Properties, Inc., a corporation, formerly Hillhaven, Inc., d/b/a Heritage Manor Nursing and Convalescent Center, by and through their attorney of record, Timothy L. Martin; and Defendant, Allan Supak, M.D., by and through his attorneys of record,

Daniel S. Sullivan and Scott F. Lehman, for dismissal with prejudice of the above-entitled cause. The Court, being fully advised and having reviewed said Stipulation, finds that the parties hereto have entered into a compromise settlement covering all claims involved in this action, which this Court approves, and that the above-entitled cause should be dismissed with prejudice to the filing of a future action pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-entitled cause be and is hereby dismissed with prejudice to the filing of a future action, the parties to bear their own respective costs.

DATED this 30 day of Sept., 1996.

S/ THOMAS R. BRETT

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

GARRISON, BROWN, CARLSON,
BUCHANAN & BUSBY

ALAN R. CARLSON -- OBA #1484
530 S.E. Delaware -- P.O. Box 1217
Bartlesville, OK 74005
(918) 336-2520
ATTORNEYS FOR PLAINTIFF

LOONEY, NICHOLS & JOHNSON

TIMOTHY L. MARTIN - OBA #10385
528 N. W. 12th St. - P. O. Box 468
Oklahoma City, OK 73101
(405) 235-7641
ATTORNEYS FOR DEFENDANTS, FIRST HEALTHCARE CORPORATION d/b/a Heritage Manor Nursing and Convalescent Center; THE HILLHAVEN CORPORATION, d/b/a Heritage Manor Nursing and Convalescent Center; and NME PROPERTIES, INC., a corporation, formerly Hillhaven, Inc., d/b/a Heritage Manor Nursing and Convalescent Center

BEST, SHARP, HOLDEN, SHERIDAN,
BEST & SULLIVAN

DANIEL S. SULLIVAN -- OBA #12887
SCOTT F. LEHMAN -- OBA #15908
100 W. 5th St., Suite 808
Tulsa, OK 74103-4225
(918) 582-1234
ATTORNEYS FOR DEFENDANT, ALLAN SUPAK, M.D.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Donna Protho,
SSN: 448--36-9997,

Plaintiff,

v.

Shirley S. Chater,
Commissioner of the Social Security Administration,

Defendant.

Case No. 93-C-410-B

ORDER

The Plaintiff, under 42 U.S.C. Section 406, has filed an application for attorney fees, and the Commissioner Defendant, has stated that she has no objection to the requested attorney fee in the amount of $3,197.25.

It is therefore ordered that Plaintiff's counsel be awarded fees under 42 U.S.C. Section 406 in the amount of $3,197.25.

Because counsel for Plaintiff is being approved an award under 28 U.S.C.S. Section 2412(b), as well as 42 U.S.C.S. Section 406, he shall pay the smaller amount to the Plaintiff. Lopez v. Sullivan, 882 F.2d 1533 (10th Cir., 1989) and Weakley v. Bowen, 803 F.2d 575 (10th Cir., 1986)

IT IS SO ORDERED this 30th day of Sept., 1996.

United States District Judge

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 10-1-96

UNITED STATES OF AMERICA,
on behalf of Consolidated Farm Service Agency,
formerly Farmers Home Administration,

Plaintiff,

v.

BRYAN E. KING,

Defendants.

FILED
SEP 2[illegible]
Phil Lombardi, Clerk
U.S. DISTRICT COURT

FILED
SEP 26 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 95-CV-872-K

DEFICIENCY JUDGMENT

This matter comes on for consideration this 26 day of September, 1996, upon the Motion of the Plaintiff, United States of America, acting on behalf of Farm Service Agency, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Bryan E. King, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion and Declaration were mailed by first-class mail to Bryan E. King, Box 755, Quapaw, Oklahoma 74363.

The Court further finds that the amount of the Judgment rendered on January 25, 1996, in favor of the Plaintiff United States of America, and against the Defendant, Bryan E. King, with interest and costs to date of sale is $69,607.46.

NOT[illegible]
[illegible]
UPON R[illegible]

15

The Court further finds that the chattel property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered January 25, 1996, for the sum of $725.00.

The Court further finds that the Plaintiff, United States of America on behalf of Farm Service Agency, is accordingly entitled to a deficiency judgment against the Defendant, Bryan E. King, as follows:

Principal Balance Plus Pre-Judgment Interest as of 01/25/96	$67,732.20
Interest From Date of Judgment to Sale	1,589.50
Marshal's Costs	117.65
Auctioneer's Fees	168.11
TOTAL	$69,607.46
Less Credit of Sale Proceeds	725.00
DEFICIENCY	**$68,882.46**

plus interest on said deficiency judgment at the legal rate of 5.90 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the sale proceeds of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America, acting on behalf of Farm Service Agency, have and recover from Defendant, Bryan E. King, a deficiency judgment in the amount of **$68,882.46**, plus interest at the legal rate of 5.90 percent per annum on said deficiency judgment from date of judgment until paid.

Jerry C. Kern
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Deficiency Judgment
Case No. 95-CV-872-K

PB:cas

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 10-1-96

UNITED STATES OF AMERICA,
on behalf of Consolidated Farm Service Agency,
formerly Farmers Home Administration,

Plaintiff,

v.

KYLE T. YOUNG and
BANK OF WYANDOTTE,

Defendants.

FILED
SEP 27 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 95-C-643-K

DEFICIENCY JUDGMENT

This matter comes on for consideration this 26 day of September, 1996, upon the Motion of the Plaintiff, United States of America, acting on behalf of Farm Service Agency, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and the Defendant, Kyle T. Young, appear neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion and Declaration were mailed by first-class mail to Kyle T. Young, Route 2, Box 193 A, Wyandotte, Oklahoma 74370, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on January 31, 1996, in favor of the Plaintiff United States of America, and against the Defendant, Kyle T. Young, with interest and costs to date of sale is $63,786.53.

NOTE: T... AND
P... IMMEDIATELY
UPON R...

The Court further finds that the livestock and chattel property involved herein were sold, pursuant to the Judgment of this Court entered January 31, 1996 and the Order Authorizing Employment Of Auctioneer And Use Of Live Stock Barn filed on May 6, 1996, for the total sum of $18,310.27 ($16,135.27 livestock and $2,175.00 chattel property).

The Court further finds that the Plaintiff, United States of America, acting on behalf of Farm Service Agency, is accordingly entitled to a deficiency judgment against the Defendant, Kyle T. Young, as follows:

Principal Balance Plus Pre-Judgment Interest As Of 01/31/96	$60,684.66
Interest From Date Of Judgment To Sale	1,141.00
Commission And Expenses For Sale Of Livestock	1,425.36
Auctioneer's Commission And Expenses	410.09
Marshal's Fees	125.42
TOTAL	$63,786.53
Less Credit of Sale Proceeds	18,310.27
DEFICIENCY	**$45,476.26**

plus interest on said deficiency judgment at the legal rate of 5.90 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the sale proceeds.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America, acting on behalf of Farm Service Agency, have and recover from Defendant, Kyle T. Young, a deficiency judgment in the amount of **$45,476.26**, plus interest at the legal rate of 5.90 percent per annum on said deficiency judgment from date of judgment until paid.

Terry C. Kern
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

WYN DEE BAKER, OBA #465
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Deficiency Judgment
Case No. 95-C-643-K (Young)

WDB:cm

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA
and TERRI BREEDLOVE, Revenue Officer,
Internal Revenue Service,

Plaintiffs,

v.

ANTHONY B. SMITH,

Defendant.

No. 95-c-1166-K

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an admistrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 26 day of September, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN R. WASHINGTON,)
)
Petitioner,)
)
vs.) No. 95-C-1077-C
)
RON CHAMPION,)
)
Respondent.)

ORDER

This matter comes before the Court on Respondent's motion to dismiss for failure to exhaust state remedies and his brief on futility of exhaustion of state remedies. (Docket #5.) Petitioner has objected. Also before the Court are Petitioner's motions for jury instructions and for a temporary restraining order or injunction. (Docket #7 and #14.)

In September 1991, Petitioner was convicted by a jury in Osage County District Court of First Degree Murder. The jury deadlocked on the issue of punishment, and Judge Mattingly sentenced the Defendant to fifty years imprisonment. On direct appeal, counsel raised the following issues:

> 1) denial of motion to suppress; 2) consideration of victim impact statement in determining sentence; (3) excessive sentence; (4) trial judge's failure to admonish jury with regard to prosecutorial misconduct; (5) the trial judge coerced jury to return a verdict before completion of diligent deliberations; (6) admission of Defendant's statements; (7) denial of motion to suppress Defendant's statements.

The Court of Criminal Appeals affirmed Petitioner's conviction and sentence on October 24, 1994, by unpublished opinion.

On April 1, 1995, Petitioner filed a petition for post-

(20)

conviction relief in Osage County District Court. (Ex. I to Respondent's Motion to Supplement the Record, docket #12.) He raised the following issues: (1) ineffective assistance of trial and appellate counsel; (2) improper jury instructions; (3) prosecutorial misconduct; (4) denial of right to be sentenced by a jury; (5) denial of exculpatory evidence; (6) denial of a speedy trial; and (7) abuse of discretion by the trial judge. (Id.) The Osage County District Court denied the application by minute order entered on June 1, 1995. (Ex. J to Respondent's Motion to Supplement the Record, docket #12.) Instead of appealing the minute order, as set out in Okla. Stat. tit. 22, § 1087, Petitioner filed a Petition for a Writ of Habeas Corpus in the Court of Criminal Appeals, raising the issues presented in his application for post-conviction relief. (Ex. G to Brief in Support of Motion to Dismiss, docket #6.) The Court of Criminal Appeals denied habeas relief on August 23, 1995. (Ex. H to Brief in Support of Motion to Dismiss, docket #6.) The Court stated as follows:

> Habeas corpus is not a substitute for a direct appeal. Moreover, the record reflects Petitioner appealed his conviction to this Court and the conviction was affirmed in an unpublished opinion issued October 24, 1994, Appeal No. F-92-327; therefore, all issues previously ruled upon by this Court are res judicata and all issues not raised in the direct appeal, which could have been raised, are waived.
>
> For a writ of habeas corpus Petitioner must establish that his confinement is unlawful or that he is entitled to immediate release. 22 O.S. Supp. 1994, Ch. 18, App., Rules of the Court of Criminal Appeals, Rule 10.6; Ekstrand v. State, 791 P.2d 92 (Okla. Crim. App. 1990). The record Petitioner has presented does no establish that his confinement is unlawful or that he is entitled to immediate release.
>
> If Petitioner seeks post-conviction relief pursuant to Section 1080 of Title 22, then he must follow the

procedures set forth in Sections 1080-1089 and 22 O.S.Supp. 1994, Ch. 18, App., Rules of the Court of Criminal Appeals, Sec. V.

Subsequently, Petitioner filed the instant pro se federal petition for a writ of habeas corpus. He seeks relief on the following grounds:

> (1) Improper consideration of the victim's impact statement in determining his sentence; (2) denial of right to be sentenced by the jury; (3) the sentence was excessive; (4) ineffective assistance of trial and appellate counsel; (5) prosecutor's failure to produce Brady material; (6) the trial judge coerced jury in returning a verdict before complete jury deliberation; (7) unconstitutional jury instructions; (8) prosecutorial misconduct; (9) admission of Petitioner's statements; (10) denial of motion to suppress Petitioner's statements made before custodial interrogation; (11) denial of right to a speedy trial.

On May 29, 1996, this Court concluded that Petitioner's failure to follow state rules in appealing the denial of his application for post-conviction relief, caused grounds two, four, five, seven and eleven to remain unexhausted. This Court noted, however, that requiring Petitioner to return to state court to exhaust those grounds may be futile. Respondent's and Petitioner's briefs on the futility of exhaustion of state remedies are now before the Court for consideration.

The futility exception is a narrow one, and is supportable "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981). In Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995), the Tenth Circuit Court of Appeals noted that

> If a federal court that is faced with a mixed petition

> determines that the petitioner's unexhausted claims would now be procedurally barred in state court, "there is a procedural default for purposes of federal habeas." Therefore, instead of dismissing the entire petition, the court can deem the unexhausted claims procedurally barred and address the properly exhausted claims.

Id. at 1131 n.3 (citations omitted). See also Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993). The Tenth Circuit in Harris referenced the Supreme Court decision in Coleman v. Thompson, 501 U.S. 722 (1991). The Coleman court observed that

> This rule [that a state court must articulate in its order its reliance on a procedural bar] does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Coleman, 501 U.S. at 735 n.1. The majority opinion in Coleman, authored by Justice O'Connor, cites Harris v. Reed, 489 U.S. 255 (1988) (O'Connor, J., concurring). In Harris, Justice O'Connor noted that

> I do not read the Court's opinion as addressing or altering the well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been properly exhausted in the state courts. . . . [I]n determining whether a remedy for a particular constitutional claim is "available," the federal courts are authorized, indeed required, to asses the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim.
>
> * * *
>
> [W]e have held that where a federal habeas petitioner raises a claim which has never been presented in any state forum, a federal court may properly determine whether the claim has been procedurally defaulted under state law, such that a remedy in state court is "unavailable" within the meaning of § 2254(c).

> * * *
>
> Moreover, dismissing such petitions for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him.
>
> * * *
>
> In sum, it is simply impossible to "require a state court to be explicit in its reliance on a procedural default," where a claim raised on federal habeas has never been presented to the state courts at all. In such a context, federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available in state court.

Id. at 268-270 (citations omitted).

In the instant case it would be futile to require Petitioner to exhaust his state remedies as to grounds two, four, five, seven and eleven. If Petitioner were to return to state court to file a second application for post-conviction relief and appeal any denial to the Court of Criminal Appeals, the state courts would find his claims procedurally barred. Oklahoma courts have consistently declined to review claims which were previously adjudicated or not raised in a first request for post-conviction relief.

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

22 O.S. 1991, § 1086.

Accordingly, Respondent's motion to dismiss the petition for

failure to exhaust state remedies is denied. The Court will deny Petitioner's claims in grounds two, four, five, seven and eleven on the basis of the procedural default doctrine unless Petitioner shows cause and prejudice or a fundamental miscarriage justice to excuse his failure to properly appeal the denial of his application for post-conviction relief. Coleman v. Thompson, 501 U.S. 722, 750; Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995). The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing "`actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss the petition for failure to exhaust state remedies (Docket #5) is hereby DENIED. Respondent shall RESPOND to grounds one, three, six, eight, nine, and ten on or before twenty (20) days from the date of filing of this order. Petitioner shall REPLY within

twenty (20) days after the filing of Respondent's response. Petitioner shall also show cause and prejudice, or a fundamental miscarriage justice to excuse his procedural default as to grounds two, four, five, seven and eleven.

IT IS FURTHER ORDERED that Petitioner's motion for production of jury instructions (Docket #7) is DENIED without prejudice to it being reasserted in the event Petitioner can show adequate cause and prejudice to excuse his procedural default of ground seven. Petitioner's motion for a temporary restraining order or injunction (Docket #14) is also DENIED without prejudice to it being reasserted as a separate civil action alleging retaliation and denial of access to the courts and the law library.

SO ORDERED THIS 30th day of September, 1996.

For: James Dale Cook

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEL DEE LANG,

Petitioner,

vs.

BOBBY BOONE and the STATE OF OKLAHOMA,

Respondent.

No. 96-CV-003-C

FILED
SEP 30 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 01 1996

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his first degree murder conviction in Rogers County District Court, Case No. CRF-86-43. Respondent has filed motions to dismiss and to amend/correct supplemental motion to dismiss. (Docket #7, #15, and #21.) Also before the Court are Petitioner's motions for appointment of counsel, for evidentiary hearing. (Docket #2, #12, #20.) As more fully set out below, the Court concludes that Respondent's motion to dismiss should be denied and that the petition for a writ of habeas corpus should be set for an evidentiary hearing.

I. BACKGROUND

On May 1, 1986, Petitioner pled guilty to First Degree Murder and received a sentence of life imprisonment. Although Petitioner did not appeal his conviction, he filed a petition for post-conviction relief on September 11, 1991. He alleged (1) the trial court erred in accepting the guilty plea without a sufficient

(27)

factual basis; (2) the trial court erred in stating the only punishment option available to Petitioner was life in prison; and (3) Petitioner was denied a pre-sentence investigation report. On August 17, 1992, Petitioner filed a motion to amend his petition by alleging ineffective assistance of counsel during the ten-day period for perfecting an appeal, and the trial court failed to place him under oath during the plea hearing. (Attachment 2 to Petition For Writ of Habeas Corpus, Docket #1.) On March 4, 1993, the District Court denied relief. The Oklahoma Court of Criminal Appeals affirmed on May 11, 1993. The Court found that "petitioner ha[d] failed to timely appeal his conviction and ha[d] not stated a valid reason for the failure and therefore review of his allegation is deemed waived." (Attachment 3 to Petition for Writ of Habeas Corpus, Docket #2.)

In the instant petition for a writ of habeas corpus, Petitioner asserts as follows:

> (1) he was denied the effective assistance of counsel; (2, 3) the State and the Department of Corrections altered the terms of the plea bargain and of the Judgment and Sentence; (4) the trial court failed to read the charging information into the record; (5) the trial court erred in accepting Petitioner's guilty plea without a sufficient factual basis; (6) the trial court and defense counsel deprived Petitioner of his right to a presentence investigation report; (7) the trial court failed to advise Petitioner that the state had to prove him guilty beyond a reasonable double and that a unanimous verdict was necessary; (8) the trial court erred in stating the only punishment option available in this case was life in prison; (9) the trial court failed to place Petitioner under oath when giving testimony at the guilty plea hearing; and (10) the trial court lost subject matter jurisdiction when the State deprived him of a direct criminal appeal.

Respondent has raised the defense of procedural default. As

to ineffective assistance of counsel, Respondent contends Petitioner never attempted to contact the trial court or defense counsel to inform them of his desire to appeal. Petitioner's counsel, Jack E. Gordon, Jr., attests as follows:

> At no time did I ever agree or did Mosier [Petitioner's other counsel] ever agree to prosecute an appeal for Mr. Lang. Since the time of his plea, I don't recall having had any correspondence with Mr. Lang concerning bringing an appeal or withdrawing his plea of guilty. Neither have I had any correspondence with him concerning a withdrawal of his plea of guilty. Finally, I haven't had any correspondence with him regarding a waiver of pre-sentence investigation.

(Affidavit, ex. B to Motion to Dismiss, Docket #8.)

Petitioner replies on the basis of the following sworn statements:

> 6. That Mr. Gordon stated that there is no evidence to support the charge of first degree murder, but that it was in my best interest to go ahead and plead guilty to a life sentence; and that if I would plead guilty that he would be sure and file an appeal in this case and that he would beat this case on appeal and have me out of jail free a lot sooner than if I went to trial, as it would be in a different court.
> 7. That even though I am not guilty of the crime charged I plead guilty upon the advise [sic] of Mr. Gordon and his statement that he would beat this case on appeal.
> 8. That Mr. Gordon continued to lead me to believe that he was going to appeal the case by his actions. During the plea hearing after the Court advised me of my right to appeal and the right to be held in the county jail for ten days. Mr. Gordon stated "Del, why don't we go ahead and do that." At which time I agreed with him to be held in the county jail for the ten days to do so. Following the hearing, while I was being escorted from the court room Mr. Gordon stated that he would be up to see me the next day.
> 9. That around the 4th day I had the jailer (Honey) call Mr. Gordon's office to tell him that I needed to talk to him about withdrawing the guilty plea. A couple of hours later Honey told me that Mr. Gordon would not be in his office until the next day. Again the next day I requested the jailer to call Mr. Gordon again. The

> jailer returned and stated that Mr. Gordon would not be in until the following week. So I sat down and wrote Mr. Gordon a letter telling him that I would rather withdraw my plea of guilty instead of appealing the case. I waited until the 8th day and still never heard from Mr. Gordon, so I wrote him another letter requesting him to come visit so we could discuss withdrawing the plea of guilty.
> 10. That I never received any response to the phone calls, nor any response to the letters to Mr. Gordon. And Mr. Gordon never came to visit.

(Docket #17.)

II. ANALYSIS

Respondent concedes, and this Court finds Petitioner meets the exhaustion requirements under the law. Therefore, Respondent's motion to dismiss the petition for failure to exhaust state remedies is hereby denied.

The alleged procedural default in this case results from Petitioner's failure to raise his claims on appeal, and his failure to provide the state court sufficient reason for failing to do so. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d

1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "`in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court finds Petitioner's claims are barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised on direct appeal. Moore v. State, 809 P.2d 63, 64 (Okla. Crim. App.), cert. denied, 502 U.S. 913 (1991) (the doctrine of res judicata bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal).

Because of this procedural default, this Court may not consider Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 501 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state

procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "`actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging ineffective assistance of counsel. He argues that counsel failed to preserve his right to appeal his guilty plea and contends that counsel failed to come to the county jail even after he contacted him by phone and by letter.

An attorney has no absolute duty in every case to advise a defendant of his appeal rights or to preserve defendant's appeal rights following a guilty plea conviction. Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Leverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992); Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "[i]f a claim of error is made on constitutional grounds, which

could result in setting aside the plea, or if the defendant inquires about an appeal right" does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock v. New Mexico, 880 F.2d 1184, 1188; see also Shaw v. Cody, 46 F.3d 452, 1995 WL 20425, *2 (10th Cir. Jan. 20, 1995) (unpublished opinion); Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (counsel's failure to file a requested appellate brief, when he had not yet been relieved of his duties through a successful withdrawal, amounted to constitutionally ineffective assistance). "This duty arises when `counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim.'" Hardiman v. Reynolds, 971 F.2d 500, 506 (quoting Marrow v. United States, 772 F.2d 525, 529 (9th Cir. 1985)).

Petitioner does not allege that during the pertinent time period counsel knew or had reason to know that Petitioner believed his assistance had been constitutionally inadequate. As noted above, counsel's duty to inform his client of his limited right to appeal a guilty plea arises only when "counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman, 971 F.2d at 506. Therefore, counsel had no duty to advise Petitioner of his right to appeal the guilty plea absent any evidence demonstrating that counsel knew or had reason to know that Petitioner believed his assistance was constitutionally inadequate. Laycock, 880 F.2d at 1188.

Petitioner argues, however, that he attempted to contact

counsel by phone and by letter during the ten-day period, but that counsel failed to respond to his phone calls and letters. The Court finds that issues of fact exist as to whether Petitioner sufficiently inquired about his appeal rights by phone and by letter, thus invoking counsel's duty to advise him of his limited right to appeal his guilty plea. See Laycock, 880 F.2d at 1188.

Petitioner's reliance on Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991), for the proposition that counsel had a duty to visit him at the county jail during the ten-day period to preserve his right to appeal is misplaced. In Baker, unlike the case at hand, the defendant was convicted following a jury trial. Therefore, counsel had the duty to "explain the advantages and disadvantages of an appeal[,] . . . provide the defendant with advice about whether there are meritorious grounds for appeal and about the probabilities of success [and] . . . inquire whether the defendant wants to appeal the conviction." Id. at 1499. Since Baker, the Tenth Circuit Court of Appeals has clarified that Baker applies only in situations where a defendant's conviction follows a jury trial. See Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992) (implicitly accepting the state's argument that Baker applies in situations where the defendant has not pled guilty); Briggs v. Carr, 53 F.3d 342, 1995 WL 250796 (10th Cir. May 1, 1995) (unpublished opinion); see also Romero v. Tansy, 46 F.3d 1024, 1031 (10th Cir. 1995) (applying Baker to a claim of ineffectiveness of counsel in not pursuing appeal following conviction after trial), cert. denied, 115 S.Ct. 2591 (1995). Therefore, the Court declines

to apply the Baker analysis to the case at hand. But see United States v. Youngblood, 14 F.3d 38, 40 (10th Cir. 1994) (applying Baker analysis to situation where defendant pled guilty, but finding effective assistance where defendant received the proper explanations from his lawyer, and "the transcript of the hearing makes it clear that [the defendant] never affirmatively indicated any desire to appeal to his counsel or to the district judge").

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motions to dismiss petition for a writ of habeas corpus (Docket #7 and #15) are DENIED. Respondent's motion to amend/correct motion to dismiss and Petitioner's motions for appointment of counsel and for an evidentiary hearing (Docket #2, #12, #20, and #21) are GRANTED. This matter is REFERRED to the assigned Magistrate Judge for an evidentiary hearing and report and recommendation. The Magistrate Judge shall determine if Petitioner qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g). See Swazo v. Wyoming Department of Corrections, 23 F.3d 332 (10th Cir. 1994); Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts.

SO ORDERED THIS 30th day of September, 1996.

Fal: James Dale Cook

H. DALE COOK
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 10/1/96

FILED
SEP 30 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL E. LOWTHER,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 95-C-919-W

JUDGMENT

Judgment is entered in favor of the Plaintiff, Michael E. Lowther, in accordance with this court's Order filed September 30, 1996.

Dated this 30th day of September, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL E. LOWTHER,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 95-C-919-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge, Dana E. McDonald (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence

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[1] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that claimant's allegations of an inability to work due to back and neck pain and numbness were credible to the extent that they were consistent with sedentary work activity. He concluded that the claimant had the residual functional capacity to perform the physical exertional and nonexertional

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[2] Judicial review of the Secretary's determination is limited scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent hm from doing any other relevant work available in the national economy?

20 C.F.R. 404.1520(1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

requirements of work, except for lifting over ten pounds and doing work that did not allow him to alternately sit and stand. He found that the claimant was unable to perform his past relevant work as a sandblaster, carpet layer, spray painter, carpenter, forklift operator, grinder, and machinery trainee. He concluded that the claimant was 42 years old, which is defined as a younger individual, illiterate, and did not have any acquired work skills which were transferable to the skilled or semi-skilled work functions of other work. Although the claimant's additional nonexertional limitations did not allow him to perform the full range of sedentary work, the ALJ found that there were a significant number of unskilled sedentary jobs in the national economy which he could perform, such as bench assembly and machine operator. Having determined that there were a significant number of unskilled sedentary jobs that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) Substantial evidence does not support the ALJ's finding that claimant retained the residual functional capacity to perform sedentary jobs with a sit-stand option in the national economy.

(2) The ALJ's first hypothetical question was improper because he asked the vocational expert to assume the claimant had a sedentary residual functional capacity, he did not consider non-exertional impairments including pain, and the vocational expert did not consider social security ruling 83-12, concerning the need to alternate sitting and standing.

It is well settled that the claimant bears the burden of proving his disability that

prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant's current medical problems originated from a job-related injury to his back sustained on July 8, 1991 (TR 61). The claimant was filling a five gallon drum as he supported it with his left leg (TR 207). His foot became immobilized in dried paint, causing injury to his back when he attempted to turn around (TR 80, 207). On July 9, 1991, a computerized tomography scan of his lumbar spine revealed a "herniated disc on the left at L5-S1" and "degenerative disc disease at L4-L5 with possible old calcified disc herniation" (TR 79). As a result of his injury, claimant underwent a posterior lumbar laminectomy and disketomy at L4-5 and at L5-S1, with a bilateral mass fusion from L4 to the sacrum, on August 4, 1991 (TR 88-98).

On January 20, 1992, claimant was diagnosed with an internal derangement of his left knee consistent with a torn meniscus after a twisting injury, and he underwent arthroscopic surgery (TR 114-115). Routine x-rays of his cervical spine on that date showed bones, joints, and discs were normal, curvature was not unusual, and alignment was within normal variation (TR 106-107).

On May 5,1992, a CT scan of claimant's lumbar spine revealed broad-based disc bulge flattening at L3-L4, fusion at L4-5 with bone spurring, and broad-based herniation at L5-S1 (TR 120). A lumbar myelogram revealed a mild stenosis at L3-L4 with central disc level bulge and poor root sleeve filling at L4-L5 on the left (TR 121, 123) Electromyographic (EMG) and nerve conduction velocity studies were normal (TR 124-128).

On May 15, 1992, lumbar diskograms were done at the L2-L3 and L3-L4 levels (TR 130-136). The L2-L3 disc was found to be entirely normal, and the L3-L4 disc showed mild degenerative changes, which were not found to be very symptomatic (TR 131). On July 13, 1992, claimant underwent a posterior lumbar laminectomy and disc excision of L3-L4, laminotomy of L2-L3, pedicle fixation of L3-L4, and a bilateral lateral fusion at L4-L5 (TR 137, 143-149).

A bone scan of the lumbar spine and pelvis on February 22,1993 revealed no significant abnormality, and an x-ray of the lumbar spine revealed the posterior fusion at L3-L4 witn no detected sublaxation (TR 153-154). An electromyogram on that date was essentially normal, except for an indication of an L5-S1 radiculopathy (TR 155).

A lumbar myelogram was performed on March 25, 1993, and showed post effusion changes from L-3 to S-1 and probable degenerative spondylitic process of L-4 and L5-S1, with poor filling of the nerve sleeves of L4-5 and L5-S1 on the left side (TR 158). A CT scan of claimant's lumbar spine revealed no significant abnormalities, except for postoperative changes, and a fairly solid fusion of the bony masses between L3 and S1 (TR 159).

On August 8, 1993, claimant underwent exploration of L4-L5 and L5-S1, and the doctor found that the L3-L4 appeared solid, found evidence of adhesions, especially at the L5-S1 level, and removed a screw that was divergent from the pedical path, yet unsymptomatic (TR 166, 170-171). Claimant was discharged with a diagnosis of residual S-1 radiculopathy and found to be totally temporarily disabled

for three months postoperatively (TR 166). On October 5, 1993, claimant's doctor reported that his right knee was swollen and effused and he was totally temporarily disabled (TR 183).

On January 13, 1994, Dr. Benjamin Benner examined claimant and found marked restriction of back motion, bilateral discomfort produced by straight leg raising, diminished left ankle jerk and extensor hallucis function, and achievement of "a plateau" (TR 179). On March 10, 1994, after noting that claimant's flexion and extension x-rays revealed absolutely no motion and excellent fusion mass, Dr. Benner determined that the claimant had reached a "satisfactory stable plane as far as his back is concerned" (TR 175).

On March 14, 1994, Dr. Benner stated that the claimant needed vocational rehabilitation and could resume "only light sedentary duties." (TR 173-174). The doctor found that claimant's postoperative status for the disk rupture, three level involvement, three operations, three-level fusion, loss of range of motion, and residual radiculopathy resulted in total disability of 41% to the whole person (TR 173-174).

On August 15, 1994, at the request of claimant's attorney, claimant was examined by Dr. Richard Hastings (TR 190-193). The doctor found myofascitis and spasm of the paravertebral muscles from T-8 to T-12, pain in the lumbosacral region, positive straight leg raising at 30 degrees on the left, 31 degrees on the right, restricted range of motion of the lumbar spine, and evidence of crepitation of the left knee during range of motion testing. He stated, "[c]onsidering this patient's age, employment history, and educational background, it is also my opinion he is 100%

permanently, economically disabled, and unemployable" (TR 192-193).

On June 26, 1996, claimant's physician reported that he was experiencing back and left leg pain and depression caused by failed rehabilitation (TR 162).

At a hearing on October 25, 1994, claimant testified that his only daily activities were sitting in his front room, taking his grandchild two blocks from his home to school, and occasionally going to the grocery store and doing dishes (TR 213). He stated that he can do no bending or carrying of heavy items and that it hurts to sit or stand more than 30 minutes at a time (TR 209). He testified that he has a driver's license and can drive, though the longest trip he has taken in the last three years is from Terlton, Oklahoma to Tulsa, Oklahoma (TR 201).

A vocational expert testified at the October 25, 1994 hearing that a person of claimant's age, education and work experience, with a 10th grade education and poor ability to read and no ability to write or work with numbers, who could not bend or crawl and needed to be able to sit and stand at will could perform unskilled bench assembly jobs and machine operating jobs (TR 220-221). However, claimant's need to sit and stand at will would reduce the number of jobs available by 75% (TR 221). When asked whether claimant would be able to do any work if his testimony was found fully credible and verified by medical evidence, she stated: "[a}ccording to his testimony, he would not be able to perform even sedentary work. He's testified that he can't sit more than 30 minutes at a time, and for sedentary work, especially unskilled, he'd have to sit two to two and a half hours at a time -- to be able to perform that work. So there would be no work he could perform." (TR 222).

There is merit to claimant's contentions. "Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. "Sedentary work" involves "lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567(a).

Substantial evidence does not support the ALJ's finding that claimant can do sedentary work with certain limitations. The ALJ determined claimant had the residual functional capacity to perform sedentary work, limited as follows: lifting over ten pounds and the need to alter positions from sitting to standing every hour (TR 18). This finding is inherently inconsistent, since the ALJ first concluded that claimant can sit six hours of an eight-hour workday by indicating his ability to perform sedentary work, and then contradicted this conclusion by stating that he needs to alter positions from sitting to standing every hour. His questions to the vocational expert seem to indicate that he perceived this limitation to mean that claimant would need to be able to sit and stand at will during an eight-hour workday. Although the ALJ suggests in his opinion that the vocational expert testified that claimant could

perform "multiple sedentary jobs", the record reveals that the vocational expert ultimately reached the opposite conclusion (TR 222).

The applicable law does not allow the ALJ to find that an individual with a residual functional capacity which includes the alternating positions limitation can perform sedentary work. Social Security Ruling 83-12, which addresses the effects of a limitation requiring an individual to alternate sitting and standing, concludes that such a limitation prevents an individual from performing most light and all sedentary jobs.[4] Since the record supports the ALJ's finding that claimant must alternate sitting and standing, he would not have the requisite residual functional capacity to perform sedentary work as a matter of law.

The decision of the ALJ is not supported by substantial evidence and is an improper application of the regulations. The decision is reversed. Claimant is entitled to disability benefits under § 216(i) and 223 of Title II of the Act, 42 U.S.C. § 416(i) and 423, respectively and the Commissioner shall compute and pay benefits accordingly.

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[4] Social Security Ruling 83-12 reads in pertinent part:

> 1. Alternate Sitting and Standing. In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for awhile before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work.

Dated this 27th day of September, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

McKINLEY D. JAMES,

Plaintiff,

v.

RALPH DUNCAN, et al.,

Defendant.

Case No. 95-C-1011-C

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of all Defendants and against the Plaintiff, McKinley D. James. Plaintiff shall take nothing on his claims. Each side is to pay its respective attorney fees.

IT IS SO ORDERED this 30th day of September, 1996.

For: H. DALE COOK
UNITED STATES DISTRICT JUDGE

(16)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

McKINLEY D. JAMES,

Plaintiff,

v.

RALPH DUNCAN, et al.,

Defendant.

Case No. 95-C-1011-C

ENTERED ON DOCKET
OCT 01 1996
DATE

FILED
SEP 30 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

In this civil rights action, Plaintiff McKinley D. James alleges that Officers Ralph Duncan and James Poulin, under the guise of legitimate penal authority, applied pepper spray in such an excessive manner as to constitute punishment of a pretrial detainee or cruel and unusual punishment under the Eighth Amendment. Plaintiff also alleges that the use of pepper spray constitutes corporal punishment in violation of 57 O.S. §§ 31, 32. Defendants have moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. (Docket #7.) For the reasons stated below the Court denies Defendants' motion to dismiss but grants their motion for summary judgment.

I. UNDISPUTED FACTS

1. On or about September 13, 1995, Officers Poulin and Duncan ordered Plaintiff to "bunk and junk" (gather belongings and bedding for relocation). (Motion to Dismiss or for Summary judgment, Docket #7, ex. A.)

(13)

2. Plaintiff refused and began to argue about the order, asserting that he had done nothing wrong. (Id.)

3. Officer Duncan ordered Plaintiff to "bunk and junk" a second time, but Plaintiff did not comply. (Id.)

4. Plaintiff was advised that noncompliance would result in the use of pepper spray. (Id.)

5. Plaintiff did not comply. (Id.)

6. Defendant Duncan released a six-second burst of pepper spray to secure compliance with relocation efforts. (Id. and ex. B).

7. Plaintiff was treated by the prison nurse, including having his eyes flushed. (Id.)

8. After being moved to another cell, Plaintiff began banging on the door and creating a disturbance. (Id.)

9. Defendant Duncan twice instructed Plaintiff to move away from the door and Plaintiff refused both orders. (Id.)

10. Defendant Duncan ordered another officer (not Defendant Poulin) to open the door and instructed Plaintiff to sit on his bunk. (Id.)

11. Plaintiff refused to comply, so Defendant Duncan entered the cell and sprayed him with pepper spray. (Id.)

12. Plaintiff complied and sat on his bunk. (Id.)

13. Plaintiff was later treated by the prison nurse including having his eyes flushed and vital signs checked. (Id.)

II. ANALYSIS

A. Motion to Dismiss

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

Plaintiff has sufficiently stated a claim for deprivations of his Fourteenth Amendment rights to avoid dismissal under Rule 12(b)(6).[1] Plaintiff's complaint specifically alleges deprivations of his Fourteenth Amendment rights supported by sufficient facts alleged to have deprived him of those rights. Furthermore, Plaintiff has attributed these deprivations to Defendants acting

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[1] Although Plaintiff may have alleged the violation of the Eighth Amendment, the Court liberally construes the complaint to allege a violation of the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment protects pretrial detainees from punishment. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

under color of law through their capacity as officers of the Tulsa County Jail. Therefore, construing Plaintiff's complaint liberally, in accord with his pro se status, the Court concludes that Plaintiff has sufficiently stated a claim upon which relief can be granted. Defendant's motion to dismiss for failure to state a claim is accordingly denied.

B. Summary Judgment

1. Standard

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991),

the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

2. Use of Pepper Gas

"Although pretrial detainees are protected under the Due Process Clause of the Fourteenth Amendment, the Eighth Amendment standards applicable to convicted persons provide the benchmark in this case." McClendon v. City of Albuquerque, 79 F.3d 1014, 1022 (10th Cir. 1996) (citing Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979)). In order for the use of pepper spray to rise to the level of an Eighth Amendment violation, Plaintiff must establish that Defendant "acted maliciously and sadistically for the very purpose of causing harm rather than in a good-faith effort to maintain or restore discipline." Mitchell v. Maynard, 80 F.3d 1433, 1440 (10th Cir. 1996) (citing Hudson v. McMillian, 503 U.S. 1, 6-7 (1992)). In making this determination, the Court must balance the need for force with the amount of force used. Hudson, 503 U.S. at 7. This standard "applies regardless of whether the corrections officers

are quelling a prison disturbance or merely trying to maintain order." Northington v. Jackson, 973 F.2d 1518, 1523 (10th Cir. 1992). The absence of serious injury is a relevant, but not dispositive, factor to be considered in the subjective analysis. Hudson, 503 U.S. at 7.

Neither the Supreme Court nor a court of appeals has held, so far as this Court can determine, that it is "per se unconstitutional for guards to spray mace [or other chemical agents, such as pepper gas,] at prisoners confined in their cells." Williams v. Benjamin, 77 F.3d 756, 763 (4th Cir. 1996); see also Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984), cert. denied, 470 U.S. 1085 (1985); Bailey v. Turner, 736 F.2d 963 (4th Cir. 1984). However, "[i]t is generally recognized that `it is a violation of the Eighth Amendment for prison officials to use mace, tear gas or other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain." Williams, 77 F.3d at 763 (4th Cir. 1996) (quoting Soto, 744 F.2d at 1270); see also Williams v. Landen, 920 F.2d 927 (4th Cir. 1990) (unpublished opinion) (reversing grant of qualified immunity to a guard who sprayed two cans of tear gas in prisoner's face for throwing water); Norris v. District of Columbia, 737 F.2d 1148 (D.C.Cir. 1984) (complaint alleged that correctional officers, without cause and for malicious purposes, maced, beat, and kicked inmate, causing substantial immediate pain as well as lingering ill effects; Battle v. Anderson, 376 F.Supp. 402 (E.D. Okla. 1974) ("the use of chemical agents such as mace or tear gas as a punitive

measure rather than a control device results in the imposition of cruel and unusual punishment in violation of the Eighth Amendment"), aff'd in part, rev'd in part, 993 F.2d 1551 (10th Cir. 1993).

The appropriateness of the use of chemical agents depends on "the `totality of the circumstances, including the provocation, the amount of gas used, and the purposes for which the gas is used.'" Williams, 77 F.3d at 763 (quoting Bailey, 736 F.2d at 969). In some instances "[a] limited application of mace may be `much more humane and effective than a flesh to flesh confrontation with an inmate.'" Williams, 77 F.3d at 763 (quoting Soto, 744 F.2d at 1262). "Moreover, prompt washing of the maced area of the body will usually provide immediate relief from pain." Williams, 77 F.3d at 763.

Courts have recognized that guards can constitutionally use chemical agents in small quantities to prevent riots or escape or to control an unruly or recalcitrant inmate, such as when an inmate refuses after adequate warning to relocate to another cell or when there is a reasonable possibility that slight force will be required. Spain v. Procunier, 600 F.2d 189, 195-96 (9th Cir. 1979); see also Smith v. Iron County, 692 F.2d 685 (10th Cir. 1982) (jailor's use of mace did not violate detainee's constitutional rights, where jailor used mace because he was by himself, there were two prisoners in the cell, jailor had heard banging noise coming from vicinity of detainee's cell and believed that detainee had heavy metal object which might have been used as weapon);

Blair-El v. Tinsman, 666 F.Supp. 1218 (S.D.Ill. 1987) (spraying of chemical agent was reasonably necessary to restore order where disturbance throughout prison was caused in large part by shouting and chanting of plaintiff); Norris v. District of Columbia, 614 F.Supp. 294 (D.C. 1985) (mace was used in a proper manner when inmate refused to enter a cell when directed to do so), aff'd 787 F.2d 675 (1986).

Courts have also recognized that guards can use chemical agents to control an unruly inmate who disobeys an order or is disrespectful to a guard while locked in his cell. See Williams, 77 F.3d at 759 (inmate was maced for throwing water out of his cell's food service window and for failing to remove his arm from the food service window of his cell); Soto, 744 F.2d at 1264 (inmates where maced while in their cells or in the strip cage for disobeying orders or for disrespect to officers); Bailey, 736 F.2d at 974 (guard was entitled to qualified immunity for spraying mace on inmate, who was incarcerated in a one-person cell, for making profane remarks against prison guard); Williams v. Scott, 1995 WL 729314, *11 (N.D.Ind. Aug. 23, 1995) (unpublished opinion) (two-second burst of mace because inmate failed to obey officer's order to stop kicking his cell door did not amount to a constitutional violation).[2] But see Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981) (finding that the use of tear gas in order to effectuate the

[2] See also Caldwell v. Moore, 968 F.2d 595, 601 (6th Cir. 1992) (use of stun gun was reasonable since prisoner had been shouting and kicking for seven hours and had already demonstrated a propensity for violence by fighting with other inmates).

retrieval of a metal food tray from an uncooperative prisoner, and to stop shouting and yelling, was constitutionally impermissible).

The courts which sanction the use of chemical agents in small quantities to control unruly inmates generally rely on the following reasoning.

> When an order is given to an inmate there are only so many choices available to the correctional officer. If it is an order that requires action by the institution, and the inmate cannot be persuaded to obey the order, some means must be used to compel compliance, such as a chemical agent or physical force. While experts [may] . . . suggest[] that rather than seek to enforce orders, it [is] possible to leave the inmate alone if he chooses not to obey a particular order, and wait him out, experience and common sense establish that a prison cannot be operated in such a way.

Soto, 744 F.2d 1260, 1267. Moreover, "responsible institutional personnel on the spot are in a better position to determine when its [chemical agent] use is necessary than the courts." Id. at 1270. It is also well to remember that prison officials' responsibility extends to the protection of the guard as well as that of the inmate. Hewitt v. Helms, 459 U.S. 460, 473-474 (1983). Therefore, courts should be extremely cautious before attempting to prohibit or limit the necessary means by which prison guards may carry out this responsibility.

Applying the above constitutional standards to the case at bar, the Court finds that Defendants acted reasonably when they sprayed Plaintiff with pepper spray in a good faith effort to restore order and prison security. Plaintiff does not deny that Defendants used pepper spray because of his failure to obey direct orders. In the first instance, Defendants used pepper spray due to

Plaintiff's refusal to obey an order to move to another cell. This Court recognizes the inherent threat of physical confrontation involved in transporting hostile prisoners from one cell to another. Chemical agents allow the officer to temporarily disable a hostile prisoner so that he may be more easily subdued with a reduced risk of injury to the officer or the prisoner. Relocation of prisoners serves a legitimate security function as a method of mitigating potential hostilities between inmates. Because of the imminent physical confrontation involved, this Court finds the use of pepper spray in transporting Plaintiff to another cell a legitimate use and not in violation of Plaintiff's constitutional rights as a pre-trial detainee.[3]

The second application of pepper spray occurred after the relocation of Plaintiff to an isolation cell and after Plaintiff persisted on banging the door of his cell in spite of a direct order to stop. While Plaintiff's behavior could not be considered a threat of serious injury or loss of life since he was locked in his cell, the Court finds that limited use of pepper gas to

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[3] In addition to questioning the legitimacy of the use of pepper spray, Plaintiff challenges the method used. Plaintiff contends that Defendant discharged pepper spray at too close a distance, constituting excessive force. He alleges that while the recommended distance between officer and prisoner at discharge is three feet, only two feet separated Defendant and Plaintiff.

Defendant, however, contends that Plaintiff used his blanket as a shield in such a way that in order to effectively use the pepper spray, Defendant had to get closer to Plaintiff. This Court declines to recognize the importance of one foot when a physical confrontation is involved due to resistance by Plaintiff. The force used was not excessive and was exercised in good faith to restore order to the prison facility.

maintain order is "a reasonable response to the institution's legitimate security concern." Soto, 744 F.2d at 1271; see also Williams v. Scott, 1995 WL 729314, *11 (N.D. Ind. Aug. 23, 1995) (unpublished opinion) (two-second burst of mace because inmate failed to obey officer's order to stop kicking his cell door did not amount to a constitutional violation).

In the alternative, the Court finds that Defendants are entitled to qualified immunity on the excessive force claims. Public officials are free from liability for monetary damages if they can prove that their conduct did not violate clearly established statutory rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Once a defendant pleads qualified immunity, Plaintiff bears the burden of establishing (1) that the defendants' conduct violated a constitutional or statutory right, and (2) that the constitutional or statutory rights were clearly established when the violation occurred. Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir. 1995). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The Tenth Circuit Court of Appeals has recognized that for a law to be clearly established "'there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" Albright, 51 F.3d at 1535 (quoting Medina v. City and County of

Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)).

On the basis of the cases cited above, the Court finds that it was not "clearly established" in 1995 that prison officials were prohibited from using chemical agents, such as pepper gas, on an unruly inmate who refused to relocate to a different cell and persisted to bang on his door in spite of orders to stop. See Williams, 77 F.3d at 762; Soto, 744 F.2d at 1260; Bailey, 736 F.2d 963. But see Lock, 641 F.2d 488. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claims of excessive use of force.

3. Relocation Within Jail

In addition to Plaintiff's objections to pepper spray usage, Plaintiff complains about the reason he was relocated and the force used in relocating him. Initially, Plaintiff objects to being moved from his cell without cause.[4] This Court is unsympathetic to Plaintiff's claim. Plaintiff has no constitutional right to be housed within a particular location within the jail facility. See Meachum v. Fano, 427 U.S. 215 (1976), reh. den. 429 U.S. 873

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[4] Plaintiff alleges racist motivations and general feelings of ill will by Defendant Duncan. These allegations stem from altercations between Plaintiff and Defendant Duncan when they attended the same Jr. High School as children. This Court declines to respond to this allegation without any showing of proof beyond mere allegation by the Plaintiff.

Plaintiff also alleges a conspiracy among the medical staff of the prison and prison officials. According to Plaintiff, the medical staff refused to examine his injuries in an attempt to avoid future liability of the prison. Plaintiff does not deny that he was treated by medical personnel after both uses of pepper spray. This Court declines to respond to this allegation without any showing of proof beyond mere allegation by the Plaintiff.

(1976); Montanye v. Haynes, 427 U.S. 236 (1976).

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss is DENIED and their motion for summary judgement is GRANTED. (Docket #7.)

IT IS SO ORDERED this 30th day of September, 1996.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN MORGAN,)
)
Petitioner,)
)
vs.) No. 96-CV-748-BU
)
STATE OF OKLAHOMA, and TULSA COUNTY,)
)
Respondents.)

ORDER

On September 5, 1996, the Court ordered Petitioner, a pro se inmate, to submit a brief explaining the constitutional claims which he is seeking to raise in the present habeas action, and whether he has exhausted his state remedies. On September 23, 1996, Petitioner submitted the requested brief.

After liberally construing the brief and petition for a writ of habeas corpus, the Court concludes Petitioner is challenging his April 25, 1996 conviction for burglary, rape, kidnaping, attempted escape, and resisting arrest. (Tulsa County case numbers CF-92-2649 and CF-92-2650). Although Petitioner mentions that he is scheduled for jury trial on January 17, 1997, on a separate case, he does not allege any constitutional violations as to that case.[1]

[1] The Court of Criminal Appeals reversed both cases because the trial judge instructed the jury that Petitioner should be

Therefore, the Court dismisses without prejudice Petitioner's claims, if any, as to the case which is set for jury trial on January 17, 1997. Petitioner will be able to reassert those claims, if any, following trial and after exhaustion of state remedies.

As to the April 26, 1996 conviction, Petitioner contends that the trial judge's conduct and evidentiary rulings were prejudicial, that the prosecutor made prejudicial statements, and that the detective violated his Miranda rights. Petitioner acknowledges that Beverly Attaberry, of the Tulsa County Public Defender's Office, is representing him on direct appeal.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, a petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize

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presumed not guilty.

friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

In the instant case, Petitioner has not exhausted his state remedies as to his April 26, 1996 conviction because he has a pending direct criminal appeal. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983); Parkhurst v. State of Wyoming, 641 F.2d 775, 776 (10th Cir. 1981). Therefore, this action must be dismissed without prejudice to it being reasserted after Petitioner has fully exhausted his state remedies by presenting all of his claims to the Court of Criminal Appeals. 28 U.S.C. § 2254(b)(A) as amended by the Anti-terrorist and Effective Death Penalty Act.

ACCORDINGLY, IT IS HEREBY ORDERED that the motion to amend (Docket #4) is GRANTED and the petition for a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED this 30th day of September, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE